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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 718

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 21, 1946

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1-15 [Names and addresses of attorneys omitted.]

16 F. D. C. No. 17829.

[File endorsement omitted.]

In the District Court of the United States within and for the Southern District of California, Southern Division

Information No. 8987

UNITED STATES OF AMERICA

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

Viol.: U. S. C., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1); 343 (a).—January Term, 1946

Information

Filed April 25, 1946

Charles H. Carr, Attorney for the United States, in and for the Southern District of California, who for the said United States in this behalf prosecutes, in his own proper person comes into Court on this — day of April, A. D. nineteen hundred and forty-six, and with leave of Court first had and obtained gives the Court here to understand and be informed, as follows, to wit:

Count One. (U. S. C., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1)).

That Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, the defendant herein, did, within the Southern Division of the Southern Judicial District of California and within the jurisdiction of this Court, on or about February 23, 1943, then and there, give to Richard Harrison Products of Hollywood, State of California, a guaranty in the following words and figures:

KELP LABORATORIES
MICHAEL J. WALSH
P. O. Box 146, Hillcrest Station
SAN DIEGO, CALIFORNIA, *February 23, 1943.*

To: RICHARD HARRISON PRODUCTS,
1443 North Highland Avenue,
Hollywood, California.

The undersigned Kelp Laboratories, whose address is 3564 First Avenue, San Diego, Calif., hereby guarantees that no food, drug,

device or cosmetic constituting, or being part of, any shipment or other delivery now or hereafter made to you by the undersigned will be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act or within the meaning of any applicable state or municipal law in which definitions of adulteration and misbranding substantially the same as
17 those contained in the Federal Food, Drug and Cosmetic Act, or will be an article which may not, under the provisions of section 404 or 505 of said Act, be introduced into interstate commerce.

This guaranty shall be a continuing guaranty and shall be binding upon the undersigned with respect to all foods, drugs, devices and cosmetics shipped or delivered to you by the undersigned (including goods in transit) before the receipt by you of written notice of the revocation thereof.

KELP LABORATORIES.
(Name of firm giving guaranty.)

MICHAEL J. WALSH, *Owner.*
(Signature and title of person giving guaranty.)

Dated February 23, 1943.

That on or about February 24, 1945, on which date the said guaranty was in full force and had the same effect as though given on said date, the said defendant did deliver at San Diego, State of California for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, a number of packages, each package containing a food within the meaning of 21 U. S. C. 321 (f) (1);

That displayed upon said packages, when delivered by the defendant for shipment to the said Richard Harrison Products, as aforesaid, was, among other things, the following printed and graphic matter:

Harrison Formula B—50 10-grain Tablets

Ingredients: Vitamin B_1, Riboflavin (Vitamin G), Niacinamide, Brewers Yeast, Whey.

"See Back Panel."

Distributed By Richard Harrison, Hollywood, California.

Made under the rigid supervision of a Former University Teacher of Food Chemistry.

18 Six Tablets daily furnish 500 I. U. Vitamin B_1 2000 mmgs. Riboflavin (Vitamin G).

10 Mg. Niacinamide.

Six tablets daily supplements the diet with One & One-Half Times the minimum adult daily requirement of Vitamin B_1 and the full minimum adult daily requirements of Vitamin G.

That on or about February 24, 1945 and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant;

That said food, when delivered by the defendant for shipment as aforesaid, to the said Richard Harrison Products, the holder of the said guaranty, was then and there adulterated within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act [52 Statutes at Large, 1040; 21 U. S. C. 342 (b) (1)], in that a valuable constituent of said food, to wit, niacinamide, had been in whole or in part omitted and abstracted from said food, in that six tablets of said food were represented to provide 10 milligrams of niacinamide, whereas, six tablets of said food would not provide 10 milligrams of niacinamide but would provide a smaller amount of niacinamide;

That by said acts the defendant did, in violation of Section 301 (h) of said Act of Congress [21 U. S. C. 331 (h)], unlawfully give to the said Richard Harrison Products a guaranty within the purview of and referred to in Section 303 (c) (2) of said Act [21 U. S. C. 333 (c) (2)], which said guaranty was false, in that said food was guaranteed by said defendant, as of the date of shipment to the holder of said guaranty, not to be then and there adulterated within the meaning of said Act of Congress, whereas, in truth and in fact, said food was then and there adulterated within the meaning of said Act of Congress, as aforesaid;

19 All of which was and is contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

Count II. (U. S. C., Title 21, Secs. 331 (h); 333 (a); 343 (a)).

And the said Attorney for the United States, in manner and form as aforesaid, also gives the Court here to understand and be informed that Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, the defendant herein, did, within the Southern Division of the Southern Judicial District of California and within the jurisdiction of this Court, on or about February 23, 1943, then and there, give to Richard Harrison Products a guaranty in the words and figures contained in the guaranty described and set forth in the first count of this information, which said guaranty in said first count described and set forth is, by reference, hereby incorporated in this count.

That on or about February 24, 1945, on which date the said guaranty was in full force and had the same effect as though given on said date, the said defendant did deliver at San Diego, State of California, for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, a number of packages, each package containing a food within the meaning of 21 U. S. C. 321 (f) (1).

That displayed upon said packages, when delivered by the defendant for shipment to the said Richard Harrison Products, as aforesaid, was the printed and graphic matter displayed upon the packages described in the first count of this information, which description in said first count is, by reference, hereby incorporated in this count.

That on or about February 24, 1945, and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant.

20. That said food, when delivered by the defendant for shipment as aforesaid, to the said Richard Harrison Products, the holder of the said guaranty, was then and there misbranded within the meaning of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act [52 Statutes at Large, 1040; 21 U. S. C. 343 (a)], in that the statement, to wit, "Six Tablets * * * furnish * * * 10 mg. niacinamide," displayed upon the packages containing said food as aforesaid, was false and misleading in this, that the said statement represented and suggested that six tablets of said food would provide 10 milligrams of niacinamide whereas, in fact and in truth, six tablets of said food would not provide 10 milligrams of niacinamide but would provide a smaller amount of niacinamide.

That by said acts the defendant did, in violation of Section 301 (h) of said Act of Congress [21 U. S. C. 331 (h)], unlawfully give to the said Richard Harrison Products a guaranty within the purview of and referred to in Section 303 (c) (2) of said Act [21 U. S. C. 333 (c) (2)], which said guaranty was false, in that said food was guaranteed by said defendant, as of the date of shipment to the holder of said guaranty, not to be then and there misbranded within the meaning of said Act of Congress, whereas, in truth and fact, said food was then and there misbranded within the meaning of said Act of Congress, as aforesaid:

All of which was and is contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

Whereupon the said Attorney for the United States prays that due process of law may be awarded against the said defendant to make him answer the premises aforesaid.

CHARLES H. CARR,
United States Attorney.
By ROBERT KOMINS,
Assistant U. S. Attorney.

21 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Motion to dismiss information

Filed June 14, 1946

The defendant, Michael Walsh, an individual, trading as Kelp Laboratories, by his attorneys, Frederick N. Kraft and Miller, Higgs, Fletcher and Glen, move that the information and each of the counts thereof be dismissed on the following grounds:

1. Neither said information nor any of the counts thereof state facts sufficient to constitute an offense against the United States.

2. The Court is without jurisdiction over said information or any of the counts thereof for the following reasons:

(a) Interstate Commerce is commerce in which the shipments cross a State line. The information contains no statement that Richard Harrison Products purchased the order for someone outside of the State of California or that it was contemplated that it would be shipped across any state line.

(b) The Richard Harrison Products does an intrastate business which may have received said product in trade, so far
22 as the information states, because it is silent as to who was to receive the shipment from Richard Harrison Products, or where it was to go.

(c) To correctly state a charge, the information should contain a statement that the shipment was intended for someone out of the State of California, and should contain the name of such person. The act provides that the offense is a "delivery for introduction into Interstate Commerce."

(d) The information does not contain any statement that said Richard Harrison Products, at the time it made the purchase from defendant, had any orders for the product in question.

(e) An offense under the act anticipates the sale to a third party other than Richard Harrison Products and/or defendant and the information contains the name of no such person.

FREDERICK N. KRAFT,
MILLER, HIGGS, FLETCHER & GLEN,
By EUGENE W. MILLER,
Attorneys for Defendant.

Received copy of the within this 14 day of June 1946.

CHARLES H. CARR, *U. S. Atty.*,
BETTY MARSHALL GRAYDON, R. M.,
Asst. U. S. Atty.,
Attorneys for U. S.

23 In United States District Court.

[Title omitted.]
[File endorsement omitted.]

Notice of motion to dismiss

Filed June 14, 1946

To United States District Attorney:

Please take notice that on June 14, 1946, the undersigned defendant filed with the Clerk of the above-entitled Court the Motion to Dismiss the Information which was on that day served upon you, and that on the 8th day of July 1946, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the United States District Court for the above District, Southern Division, at the Federal Building in the City of San Diego, State of California, said Motion to Dismiss will be presented to the Court.

Dated this 14th day of June 1946.

FREDERICK N. KRAFT,
MILLER, HIGGS, FLETCHER & GLEN,
By EUGENE W. MILLER,
Attorneys for Defendant.

Received copy of the within this 14 day of June 1946.

CHARLES H. CARR,
U. S. Attorney.
BETTY MARSHALL GRAYDON, R. M.,
Asst. U. S. Atty., Attorneys for U. S.

24 [File endorsement omitted.]

25 In The United States District Court for the Southern District of California, Southern Division

Honorable J. F. T. O'Connor, Judge Presiding

No. 8987 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES, DEFENDANT

Reporter's transcript of proceedings

Filed Nov. 19, 1946

SAN DIEGO, CALIFORNIA,
Thursday, July 11, 1946.

Appearances: For the Plaintiff: James M. Carter, United States Attorney; by Betty M. Graydon, Assistant United States Attorney. For the Defendant: Eugene W. Miller, Esq., 726 Bank of America Building, San Diego, California.

26 SAN DIEGO, CALIFORNIA,
Thursday, July 11, 1946, 10:00 o'clock.

THE CLERK. No. 8987 Criminal, United States of America v. Michael Walsh, an individual, trading as Kelp Laboratories, hearing of motion to dismiss, pursuant to notice filed June 14, 1946.

Motion to vacate plea of not guilty

MR. MILLER. We ask, if the court please, that the plea of not guilty may be vacated and this motion to dismiss heard.

THE COURT. The motion of the defendant will be granted and the plea set aside.

Argument on motion to dismiss

MR. MILLER. The information, if the court please, is one under Section 331 (h) of the Food and Drug Act for giving a guarantee provided for in 333 (c) 2, I believe, of the Act, from the manufacturer to a distributor and the information alleges that Michael Walsh, an individual, trading and doing business as Kelp Laboratories at San Diego, State of California, gave to Richard Harrison Products of Hollywood, a guarantee in words as follows:

It is the usual guarantee provided for in the Food and Drug Act under the section last mentioned to the effect that it guarantees that merchandise will not be adulterated or misbranded.

Michael Walsh is alleged to be in place of business in San Diego, California, and Richard Harrison in Hollywood, and it states that on February 24, 1945, on which date the said
27 guarantee was in full force and effect, the defendant did deliver at San Diego, State of California, for shipment to Hollywood, State of California, consigned to the said Richard Harrison Products, certain packages of food, and then it states that it was branded to be a certain amount of milligrams of niacinamide and that that particular shipment was defective in that matter.

Then it states also that on or about February 24, 1945, that is, the date of the shipment from San Diego to Hollywood and prior to that date and subsequent to it Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food supplied by the defendant of this kind.

Then it states that this guarantee was false in that it did not contain the right number of milligrams of niacinamide and it was therefore, adulterated and the guarantee was false in that respect.

The sections we have referred to and which the court is familiar with are in the pamphlet form which I will refer to shortly.

Now, the second count is identical to the first count with the exception that it states that the guarantee was false for the reason that this particular shipment from San Diego to Hollywood was misbranded. Of course, your Honor will recall that under
28 the Barnes decision there would be just one punishment on one offense, the one guarantee that was false.

The COURT. I tried the Barnes case.

Mr. MILLER. Yes; I recall that you did. Our motion to dismiss is as follows:

1. Neither said information nor any of the counts thereof states facts sufficient to constitute an offense against the United States.

2. The court is without jurisdiction over said information or any of the counts thereof for the following reasons:

(a) Interstate commerce is commerce in which the shipments cross a state line. The information contains no statement that Richard Harrison Products purchased the order for someone outside of the state of California or that it was contemplated that it would be shipped across any state line.

(b) The Richard Harrison Products does an intrastate business which may have received said product in trade, so far as the information states, because it is silent as to who was to receive the shipment from Richard Harrison Products, or where it was to go.

(c) To correctly state a charge, the information should contain a statement that the shipment was intended for someone out

of the state of California, and should contain the name of such person. The act provides that the offense is a "delivery for introduction into interstate commerce."

(d) The information does not contain any statement that said Richard Harrison Products, at the time it made the purchase from defendant, had any orders for the product in question.

(e) An offense under the act anticipates the sale to a third party other than Richard Harrison Products and/or defendant and the information contains the name of no such person.

Now, the information in this respect just states that this shipment was made, the shipment which was supposed to be defective and which was supposed to be covered by a guarantee given under the Food and Drug Act based on interstate commerce, that shipment went from San Diego to Hollywood and there it stopped. There is no other allegation about it. This particular shipment so far as the allegations are concerned was intrastate so far as it ever went, so far as it ever traveled, so far as the information is concerned, and it states.

Now, they intended to say, the information by these allegations, that on that day of the shipment and before and after that Richard Harrison Products was engaged in the business of interstate commerce with this sort of merchandise, not that this shipment was ever to go there. There is no statement that it had ever been ordered to go there, no statement that it was ever contemplated to go interstate, no statement that this was just a part of the route from which it would continue into some other state, naming it, or some other person, naming the person, outside of the state. It just states and leaves it for the inference of the court, for conjecture as to whether or not this particular shipment was ever to be an interstate shipment, or say that this delivery was one, therefore, that would break the guarantee.

In order to save this indictment, the court must make an inference or conjecture that this means that the shipment was intended for interstate commerce and did go into interstate commerce and went out into interstate commerce because Congress has no power to provide against property that goes from one part of the state to another part of the state. For all the indictment is concerned, this could have stopped right in Los Angeles or Hollywood and been consumed there. It could have been that the defendant understood that it was to never go into interstate commerce. It could have been understood that the Richard Harrison Products ordered it for the purpose of putting it over to San Francisco or San Bernardino. The court must presume something in order to make this indictment good.

There are a half-dozen accounts that are good and perfectly legal where this shipment could have gone or could have gone
31 there and then come back to the defendant. The court must presume not that he has performed an innocent act but that he performed a guilty act.

To make the indictment good we must presume the defendant guilty before there is any evidence in the case.

Now, to follow that up with the sections, the section under which this is brought is 331. I am speaking now of the United States Code Annotated sections. In the other form it is 301, but 331 (h) is the one under which the information is drawn, which states as follows:

"The following acts and the causing thereof are hereby prohibited." Now, we will go down to (h). This reads as follows:

"The giving of a guarantee or undertaking referred to in Section 333 (c) (2), which guarantee or undertaking is false, except by a person who relied upon a guarantee or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guarantee or undertaking referred to in Section 333 (c) (3), which guarantee or undertaking is false."

Now, that is what they say. This indictment says we gave a guarantee and that guarantee is false and the guarantee
32 is provided for in 333 (c) (2), so we will go to that.

Now, your Honor is perfectly familiar with that sort of a guarantee. That guarantee is to save the wholesaler. The manufacturer gives that guarantee to the wholesaler to save the wholesaler from liability under the Act, and this particular part of the section says: "No person shall be subject to the penalties of subsection (a) of this section." Now it will be down to 2. That will be 333 (c) (2), that is, for having violated 331 (a) (c) (d) if he establishes this guarantee.

So, that guarantee is made in reference to the misdemeanor or crime that would be committed under 331 (a) (c) (d). It is made in reference to nothing else. Its validity, truth or falsity must be measured by what it was intended for.

Now, reading from 331 (a), this is what the wholesaler will be saved from:

"The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded." 331 (d) reads as follows:

"The introduction or delivery for introduction into interstate commerce of any article in violation of Section 344 or 355."

So, the guarantee was never intended to cover anything that is intrastate. It was never made for Sections that re-

33 lated to intrastate or it would be unconstitutional. It was made for the purpose of providing protection against the introduction or delivery for introduction into interstate commerce.

So, one element of the offense is that it must be shown that this was a delivery by Harrison Products Company, that this was delivered into interstate commerce, introduced into it, or that Richard Harrison Products delivered for introduction into interstate commerce. Now, that same reasoning is in the Barnes case.

The COURT: Do you have the citation?

Mr. MILLER. The citation is 142 F. (2d) 648. I will only read that one part. This one part related to the two counts of that case which are similar to the two counts of this case, the first and second count of that case. The third count was where Barnes actually delivered, as I recall it, some products himself right into interstate commerce, but they tried to get out of it on the ground that they were a bailee or agent for the other party, and the court did not stand for it, naturally. Now, relating to these first two counts that are similar to this count, I will read point 1:

"Under the present act persons are subject to its penalties for introducing or delivering for introduction into interstate
34 commerce any food that is adulterated or misbranded."

That is very well, but to continue:

"But liability may be avoided if such persons have obtained a guarantee of the person from whom they in good faith received the product, and liability is then imposed upon the guarantor for giving a false guarantee."

Now, this is the point I wanted to call the court's attention to. The falsity described in Section 331 (h) must be defined in terms of the conduct prohibited by Section 331 (a). It must be defined by the delivery. I mean the introduction or delivery for introduction into interstate commerce which is prohibited by Section 331 (a) and (c). So, the gravamen of this offense is the delivery or introduction for delivery into interstate commerce or at least that the particular shipment which was defective must have been intended for or actually used or actually introduced or delivered for introduction into interstate commerce, upon which point this information is wholly silent.

Now, as I said before, they leave it for inference whether it ever reached the state where it made this guarantee an offense. The guarantee was given not to protect a man living in San Francisco when the shipment was made from San Diego to Hollywood to San Francisco. It was meant to protect men who receive
35 goods through interstate commerce. So, when the guarantee was given no contemplation could have been made on the part of Mr. Walsh of the Kelp Laboratories that he was giving a

guarantee whose falsity would be measured by a shipment wholly interstate. He may put any amount of niacinamide in any shipment that went from San Diego to Hollywood and stopped and never break the guarantee. The guarantee never referred to that, according to the language also of Judge Denman in the Barnes case. Now, in the ordinary drawing of an information where does that land us? Under Rule 7-C of the federal rules of criminal procedure the indictment or information it says shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. That is just putting into language partially the old rule in the cases prior to the making of that rule. You have got to state the facts definitely in plain language, not leave it for inference or argument, not leave it for presumption.

Let us see what is said in Asgill v. United States, 60 F. (2d) 780. I am reading from the body of the case on page 784:

"While given full effect not only to the letter but to the spirit of the statute, it must be read in connection with the Sixth Amendment to the Constitution, which requires that the defendant be informed of the nature and cause of the accusation, this in-
36 formation to be set out through an indictment by the grand jury as guaranteed in the Fifth Amendment. Neither the statute nor the decisions was or were intended to qualify or amend, nor could they qualify, amend, or set aside these provisions of the Constitution.

"No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the State will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged." I will drop down a few lines:

"As stated in Pettibone v. United States, 37 Law Edition 419: The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission must be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital," quoting several United States Supreme Court cases.

Then, more in line or just as in line is the Moens case. I will
not read from it because the principle involved is too plain.
37 That is the case of Moens v. United States, 267 F. 317.
That case puts the measurement this way. To test the information or indictment it is provided if all facts stated in the indictment could be true and yet the defendant may not be guilty of the offense charged.

If you place that construction on this information all the facts may be true and yet the defendant may be perfectly innocent.

The COURT. Well, that is the usual test.

Mr. MILLER. Yes. Now, there is one case under this Food and Drug Act where the shipment was wholly intrastate where there is no allegation in the indictment or no reference before the jury or court that the merchandise in question went solely intrastate. In fact, there are several cases which presume this and that, but in each case where anything is said about the question that might otherwise throw some enlightenment on it, the indictment definitely alleges that the shipment was made to some point in another state, all the facts before the jury and the court stated definitely that the shipment did go to another state and, having that before the court, the court had a right to say that that was intrastate, and if those cases should be considered, I will ask the court to—there is one case in the Ninth Circuit Court of Appeals. I don't have the citation, but it is Wilson Milling Company vs. Cardoff.

In that case the shipment was from some place in Idaho
38 to another place in Idaho and the question came up in that case as to whether there was a breach of the Food and Drug Act, although it was a civil case. The court said there was no offense charged in that just because the purchaser, that is, the distributor who was making a product, just because the purchaser intended to use it in interstate commerce did not break the Food and Drug Act.

Now, in considering the cases which contain statements that might have some bearing if they were not obiter dicta statements, I ask the court to recall the premise laid down in Osaka Shosen v. United States, 81 L. Ed. 532:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Now, here is this very point presented for decision. If other cases are quoted, I would ask the right to reply.

Mrs. GRAYDON. If the court please, the government is firmly of the opinion that when goods covered by a guarantee are shipped by the guarantor to a purchaser who is engaged in interstate commerce that the law has been violated.

One case, the Glaser, Kohn & Co. v. United States in
39 224 Fed. 84, a Seventh Circuit Court case, the court said in part in the opinion:

"With regard to the objection that the transaction does not, so far as plaintiff in error is concerned, come within interstate

commerce, plaintiff in error does not in its brief include it among the errors relied on. We are, however, satisfied that the point is not well taken. Steele-Wedeles Company was a wholesale grocer engaged in interstate commerce, as plaintiff in error well knew. By selling and delivering the preserves to that corporation upon the terms of the guarantee, it deliberately placed them in interstate commerce channels."

Now, in that particular case there was an interstate shipment of the goods in question but it seems to the government that that would not necessarily be a requirement under the words used in the opinion that by selling and delivering to a corporation upon the terms of the guarantee, it deliberately places them in interstate commerce channels.

The similar issue was raised in the case of United States v. Charles L. Heinle Specialty Company, 175 Fed. 299. This is a District Court case. Quoting from the opinion by that court:

40 "There is nothing in the act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling or delivering of any articles of food within the states. The act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce, nothing more; and in order that this may be accomplished it prohibits the party who makes or manufactures the food, and who knows what it contains, from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant expressly under the provisions of the act, if false, could have been made with no purpose other than to defeat the object of the act. This prohibition is obviously essential to the enforcement of one of the important powers with which Congress is entrusted, to wit, the regulation of interstate commerce."

This, of course, is the act of 1938 that we are dealing with, which is a rewritten old 1906 act and in which the best features of the 1906 act were retained.

As pointed out in United States v. Dotterweich, 320 U. S. at 277, at page 280, in which the court said:

41 "The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience."

In the old act the guarantor was substituted for the shipper when the shipper had shipped in interstate commerce and under the new act we have this new section which makes the guarantor liable for giving the guarantee itself, which is not included in

the old act, and the Congress thus made the giving of this particular kind of false guarantee an offense which is independent of the introduction in interstate commerce of the illicit articles by the guarantee.

To come within the scope of 21 U. S. Code 331 (h), the one that refers to the false guarantee, the false guarantee must meet the requirements of 21 U. S. Code 333 (c) (2), that is, it must be of such character that it could be used as a defense by the recipient in the event he ships in interstate commerce the goods to which it pertains. The prohibition against the giving of such a guarantee is absolute and independent of whether the recipient has actually violated 21 U. S. C. 331 (a) by shipping the article interstate in reliance upon the guarantee.

This principle has been recognized by several law writers:

42 "The act of giving a false guarantee was not made into a crime by the old law although under the law of 1906 the guarantor could be prosecuted for adulteration of goods or misbranding if the guarantee turned out to have been false. However, there was no penalty provided simply for the giving of a false guarantee as is provided in 1938 act."

Again in the case of the United States v. Dotterweich, in 320 U. S. Fed. 277, at page 280, the court said:

"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond health protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."

The courts have been unanimous in declaring that a broad and liberal construction should be given to the terms of the Food and Drug Act.

It is, of course, firmly established that the power of Congress to regulate interstate commerce is not limited to the field of transportation alone but encompasses a wide variety of activities which

43 are in themselves intrastate but which affect interstate commerce, and the government refers to Currin v. Wallace, 306 U. S. 1, and U. S. v. Darby, 312 U. S. 100.

Going back to our old Barnes v. United States case:

"Commerce so used in the statute is not confined in meaning to the actual transportation of articles across state lines, but includes the whole transaction of which transporting is a part."

Then, in a case not involving the food and drug cases, but where the similar principle is involved, in United States v. Ferger, et al., 250 U. S. 199; in this case the defendant was charged with violating the federal bill of lading statute by forging and uttering

false bills of lading purporting to represent goods received for interstate shipment.

The bills were negotiable in form, following the standard approved by the Interstate Commerce Commission. The defendant argued that the act of Congress was unconstitutional since the goods were nonexistent and involved no actual interstate shipment.

On this point the court said:

"It is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power
44 of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution."

In the same case the court said further:

"Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively
45 local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate."

Therefore, in view of the cases cited the government submits that such authorities clearly uphold the power of Congress to strike at the menace to interstate commerce such as in the case under consideration here, and it is the government's view that through Section 331 (h) of Title 21 Congress has unequivocally chosen to exercise that power. It should be noted, however, that the other sections prohibit acts which do not necessarily relate to the actual interstate shipment of goods. These are subsections d, f, i, j, and

1 of Title 331. There are many similar cases, but those are the leading cases.

The Attorney General's department has taken the stand and has stated, too, that it is the position that 21 U. S. C. 331 (h) is designed to reach just the situation where a false guarantee of compliance with the Federal Food, Drug and Cosmetic Act is given in connection with an interstate transaction involving a food, drug, device, or cosmetic. Where it can be established that there is a reasonable likelihood that the adulterated or misbranded article covered by the guarantee will enter the channels of inter-
46 state commerce, it is within the power of Congress to prosecute the guarantor.

Of course, in the information it is charged that the consignee, Richard Harrison Products Company, prior and subsequent to the date of February 24, 1945, was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as described in the information which had been supplied by the defendant. There is no particular interstate shipment charged but there is the allegation that this food has been shipped both before and after the date of the guarantee.

The COURT. At this time we will take a short recess.

(Short recess.)

The COURT. Is there anything further, Mrs. Graydon?

MR. MILLER. Very little, if the court please. The first decisions cited by counsel were situations where a shipment went actually interstate. It was so alleged in the information and so proved at the trial. I am speaking of the Kohn case. There the wholesaler shipped the merchandise from Chicago to Rock Springs, Wyoming, and the information so charged; and in the Heinle Specialty Company case where there was a demurrer the indictment stated in so many words that the dealer sold the same into interstate commerce and the shipment in question that was defective was shipped in interstate commerce.

In the Barnes case the first two counts were on guarantee
47 and on those I quoted the court's expressions in my argument which stated that 331 (h) must be confined in terms of the conduct prohibited by 331 (a) which is that the goods were for introduction or for delivery and introduction into interstate commerce.

I refer to the expression quoted by counsel to the effect that interstate commerce does not include just the actual going over the state line but it includes the whole transaction of which this is a part. Now, that was quoted not in relation to the two counts on guarantee. The court made that expression relative to the last

count where Barnes was charged with himself shipping, not in giving a guarantee. He was charged with introducing into interstate commerce, being a shipment going from Gardena, California, to Portland, Oregon.

Relative to the general definitions of how broad interstate commerce may be relative to this, that, and the other thing, including bills of lading or this act, it is not so directly in point in this case.

We are not trying to say that the whole thing is unconstitutional because it does not relate to interstate commerce at all. Maybe we could, but we are not raising that point. We are limiting in this case—not we are limiting—we are limited by the act itself and by the conduct itself and the act in this case does not go any further than just this. This guarantee is to be given for
48 having violated Section 331 (a) and (d).

The guarantee relates by definite express words of the statute, and that is what the Barnes case said, that it is defined by and relates to Section 331 (a) and (d).

Now, to go to 331 (a), there it says for the introduction of the thing prohibited, the introduction or delivery for introduction into interstate commerce and (d) has the same language, so that the general theory of how broad Congress can go is not in question here. The fact in question here is how far did this statute go, and the statute only went so far that the goods must be shown to be those that did go or were intended to go for delivery for introduction into interstate commerce or for delivery for introduction into interstate commerce and neither of those facts are alleged in this case and can only be drawn unlawfully and against the law by inference, again intendment or presumption that a man is guilty instead of innocent.

Decision

The Court. It is a very close question here raised. Unless the act can be justified under the interstate commerce laws of the Consituation, of course it is unconstitutional. Probably the most discussed and analyzed constitutional provision is the one on interstate commerce. My recollection of the first case was Gibbs v. Hogan. Since the enactment of the Fair Labor Standards Act there has been a renewed discussion and a great number of
49 decisions construing the interstate commerce application to various facts. This court is bound by the decisions of the Supreme Court of the United States in all of those matters.

Under the Fair Labor Standards Act there seems to be no limit to the extension of that particular act of Congress on the questions raised as to how it is extended. One of the very late decisions is Borden Company v. Borella, 325 U. S. 679. In

that case the Borden Company had its principal offices in New York. It owned and operated an office building in which 58 percent of the rental space was used for its central office for production of goods for interstate commerce, although the goods were actually produced at plants located elsewhere. Now, there were no goods at all manufactured or placed in interstate commerce in the state of New York.

The Supreme Court, with the vigorous dissent by the Chief Justice of the United States, held that it was not necessary to produce any goods for interstate commerce if the company managed its business from the state employees in that office and in that building—they were held engaged in the production of goods for interstate commerce although no goods were produced for interstate commerce in that state. Chief Justice Stone said in part in his dissent:

"The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process; as did the services rendered in Kirschbaum Company v. Walling, supra.

"The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. McLeod v. Threkeld, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it. I would reverse the judgment. Mr. Justice Roberts join in this opinion.".

There is another opinion, and I do not have the citation at hand, but it was rendered about the same time, in which the Supreme Court held that certain goods were produced in the city of New York and sold to a company and the second company placed the goods in interstate commerce. The manufacturing company put no goods in interstate correce, merely sold them to another company which in turn did place them in interstate commerce.

The Supreme Court for the United States in another case hold that a janitor of a building who was not employed by and had no connection with the company that had rented space in the build-

ing and was engaged in interstate commerce, that the janitor was engaged in production of goods for interstate commerce and came under the Fair Labor Standards Act.

In Warren-Bradshaw Drilling Company v. Hall, 317 U. S. 88, an independent contractor who drilled holes in the ground to produce oil and had no other connection with the oil company or the production of oil for interstate commerce and did not produce oil for interstate commerce except that it drilled the holes and was paid for that particular operation, it was held that the employees of the independent drilling company were producing goods for interstate commerce and came under the provisions of the Fair Labor Standards Act.

In Jewell Ridge Coal Company v. Local 6167 in 325 U. S. 161, the Supreme Court went so far as to hold null and void a collective bargaining agreement, again because of the Fair Labor Standards Act. There was dissent from the majority opinion by
52 the Chief Justice, Mr. Justice Roberts, and Mr. Justice Frankfurter.

Again the Supreme Court of the United States in 10 East 40th Street Building, Inc., v. Callus, et al., in 325 U. S. 578, held:

"Maintenance employees of a typical metropolitan office building, operated as an independent enterprise, which is used and to be used for offices by every variety of tenants, including some producers of goods for commerce, held not to have such a close and immediate tie with the process of production as to be deemed engaged in an occupation necessary to the production of goods for commerce, within the meaning of Section 3 (j) of the Fair Labor Standards Act, and therefore not covered by the act."

Mr. Justice Frankfurter wrote the opinion. The Chief Justice Stone referred to his opinion in the Borden v. Borella case and stated that his views there would control his decision in this case. Mr. Justice Murphy dissented.

These few cases are mentioned to indicate the flux of the law, and somewhat the uncertainty as to just what extent the Supreme Court of the United States, which controls all of the decisions of this court, have found in these particular cases.

Now, will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they
53 have the Fair Labor Standards Act?

There are those who contend there is nothing left for the states in the way of intrastate commerce. A farmer who brings his potatoes to sell in the city could probably be charged with the knowledge that some of those potatoes are going into interstate commerce. The same is true of eggs or any other products that are farmed.

The information in the case before the court alleges that Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food labeled as aforesaid which had been supplied by the said defendant. Therefore, the sole issue under this motion before the court is whether or not packages delivered under the act to Richard Harrison Products by the defendant Michael Walsh, an individual trading as Kelp Laboratories, which might never go into interstate commerce—the mere fact that they might place these particular packages in interstate commerce is sufficient according to the contention of the government.

It is the government's position that it is not necessary to follow the particular shipment here by the defendant into the channels of interstate commerce that they might rest in Hollywood, having been shipped from San Diego, and be sold locally to a drug store or some other purchaser in Hollywood; that is a violation
54 of the statute because some other packages were shipped in interstate commerce. The information alleges that similar packages had been shipped and labeled similar to the particular one before the court by the Richard Harrison Products.

I believe you will all agree that it is a very close question. There is no decision exactly in point. There is a distinction between the interpretation of the Fair Labor Standards Act and this particular Pure Food and Drug Act in that the court is now confronted with the statute, Section 333, Title 21 U. S. C. A., which provides:

"Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

We all know that criminal statutes must be strictly construed and shall not be extended by the courts so as to brand individuals as criminals unless there is clear authority under the law to do so.

55 The government asks this court to assume that the particular shipment in question and described in the information will be placed in interstate commerce and thus bring the defendant within the terms of the act. I do not believe that it is the policy of Congress or of the courts to extend criminal statutes or to anticipate acts which are not criminal at the time and which might never become criminal in order to find the

defendant guilty. Such an interruption of business would do violence to all the civil rights of an individual.

Courts are instituted to not only enforce the law against those who violate it but to protect those who have not violated the law even charged with an offense.

The court has spent considerable time reviewing this particular law when the court tried the case of Barnes. That is found in 142 Fed. (2d) 648. Barnes was found guilty in my court and the decision was affirmed by the Ninth Circuit.

The motion to dismiss on all the grounds urged by the defendant will be granted and exception will be allowed to the government.

The court will recess until 2:00 o'clock.

56 [Reporter's certificate to foregoing transcript omitted in printing.]

57 [File endorsement omitted.]

In the District Court of the United States within and for the Southern District of California, Southern Division

Information No. 8987

UNITED STATES OF AMERICA

vs.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

Viol.: USC., Title 21, Secs. 331 (h); 333 (a); 342 (b) (1); 343 (a).

Order dismissing information

Filed Sept. 18, 1946

The motion filed herein on June 14, 1946, to dismiss the information came on regularly for hearing on July 8, 1946, due notice having been given of the time for the hearing of said motion and the hearing thereof having been continued by consent of defendant and the United States District Attorney to July 11, 1946, and defendant, by Eugene W. Miller of Miller, Higgs, Fletcher and Glen, his attorneys, having argued said motion and submitted his authorities, and the United States District Attorney by Betty Marshall Graydon having argued said motion and submitted her authorities on behalf of the United States of America and the matter having been submitted to the Court,

It is ordered that the information herein be dismissed on the grounds that it does not state facts sufficient to constitute an offense against the United States under the Federal Food, Drug and Cosmetics Act.

Dated: Sept. 18, 1946.

J. F. T. O'CONNOR,
Judge.

Approved as to form:
ARTHUR LIVINGSTON.

58 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Oct, 17, 1946

The United States of America, by its attorneys, J. Howard McGrath, Solicitor General, and James M. Carter, United States Attorney for the Southern District of California, hereby appeals to the Supreme Court of the United States from the judgment of the United States District Court for the Southern District of California (Southern Division), entered September 18, 1946, dismissing the information against the defendant, Michael Walsh, an individual, trading as Kelp Laboratories, charging him with having violated Section 301 (h) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938 (c. 675, 52 Stat. 1040, 21 U. S. C. 331 (h)), in that he gave to Richard Harrison Products of Hollywood, California, a concern engaged in introducing and delivering for introduction into interstate commerce quantities of a food supplied by the defendant, a continuing guaranty that no food, drug, device or cosmetic shipped or delivered to Richard Harrison Products by the defendant would be adulterated or misbranded within the meaning of the Act, which guaranty was false in respect of a shipment of food thereafter consigned by the defendant
59 to Richard Harrison Products, in that such food was adulterated and misbranded within the meaning of the Act.

Dated October 17, 1946.

J. HOWARD MCGRATH,
Solicitor General,
Department of Justice, Washington, D. C.
JAMES M. CARTER,
United States Attorney,
Los Angeles, California.

60 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Stipulation as to designation of record on appeal

Filed Nov. 19, 1946

It is hereby stipulated, by and between counsel for the parties in the above-entitled action, that the Clerk of the United States District Court for the Southern District of California make a Transcript of Record to be filed in the Supreme Court of the United States, pursuant to appeal in the above-entitled cause, and that the said Transcript of Record include the following documents:

1. Information.
2. Motion to Dismiss Information.
3. Complete transcript of proceedings before the Honorable J. F. T. O'Connor, on July 11, 1946, including argument, statement and rulings by the Court.
4. Order dismissing Information, entered September 18, 1946.

61 5. Notice of Appeal.
6. Jurisdictional Statement.
7. This Stipulation.

Dated: November —, 1946.

JAMES M. CARTER,
United States Attorney,
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Chief of Criminal Division.

By Arthur Livingston,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Appellant.

MILLER, HIGGS, FLETCHER & GLEN,
By Eugene W. Miller,
EUGENE W. MILLER,
Attorneys for Defendant and Appellee.

62 In the District Court of the United States

[Title omitted.]

Certificate of clerk

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61 inclusive contain full, true, and correct copies of the Information; Motion to Dismiss Information; Notice of Motion to Dismiss; Reporter's Transcript of Proceedings on July 11, 1946; Order Dismissing Information; Notice of Appeal and Stipulation as to Designation of Record on Appeal and the Original Jurisdictional Statement which constitute the record on appeal to the Supreme Court of the United States.

I further certify that a copy of the Notice of Appeal was mailed to counsel for the defendant on October 17, 1946, as provided by Rule 37 (a) (1) of the Federal Rules of Criminal Procedure.

Witness my hand and the seal of said District Court this 20th day of November, A. D. 1946.

[SEAL]

EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

63 Supreme Court of the United States

No. 718, October Term 1946

Order noting probable jurisdiction

December 16, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

65 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Jan. 3, 1947

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The district court erred in holding that the information did not state an offense under the Federal Food, Drug and Cosmetic Act.

2. The district court erred in holding that Section 301 (h) of the Federal Food, Drug and Cosmetic Act does not apply to the giving of a false guaranty in respect of a shipment in intrastate commerce to a consignee who does both an intra- and interstate business, in the absence of an allegation that the shipment, or some part of it, actually entered the channels of interstate commerce.

3. The district court erred in holding that the appellee's giving of a false guaranty, as charged in the information, did not constitute a criminal violation of the Federal Food, Drug and Cosmetic Act, because he was not charged with having given a false guaranty in respect of a shipment moving in or as a part of interstate commerce.

4. The district court erred in granting the motion to dismiss the information.

66 Appellant deems the entire record, as filed in the above entitled case, necessary for the consideration of the points relied upon.

GEORGE T. WASHINGTON,
Acting Solicitor General.

I hereby certify that I have this day served a copy of the foregoing Statement of Points to be Relied Upon and Designation of Record on Eugene W. Miller, Esquire, 729 Bank of America Building, San Diego, California, Attorney for Appellee, by mailing a copy to him at his business address.

GEORGE T. WASHINGTON,
Acting Solicitor General.

Dated at Washington, D. C., this 2nd day of January 1947.

67 In the District Court of the United States

[Title omitted.]

Stipulation correcting reporter's transcript of proceedings

Filed Jan. 11, 1947

It is hereby stipulated between counsel for the parties in the above-entitled action that the reporter's transcript of proceedings, certified by the official reporter on September 6, 1946, may be

changed to correctly state the argument of counsel for the defendant in the particulars as follows:

1. In line 5 on page 3 of said transcript the word "be" may be changed to the word "have."

2. In line 14 on page 5 the word "that" may be inserted after the word "that" and before the word "shipment."

3. Line 20 on page 5 may be changed to read as follows: "Now they intended to say that this shipment went into interstate commerce in the information by these allegations."

68 4. In line 3 on page 6 the word "to" may be inserted after the word "or" and before the word "some."

5. The last sentence of the first paragraph on page 6, beginning on line 4, may be changed to read as follows: "It just so states and leaves it for the inference of the Court, for conjecture as to whether or not this particular shipment was ever to be an interstate shipment and that this delivery was one, therefore, that would break the guarantee."

6. In line 20 on page 6 the word "putting" may be changed to the word "sending."

7. The last 3 lines on page 6 may be changed to read as follows: "There are a half dozen accounts that are good and perfectly legal to where this shipment could have gone from Hollywood, or it could have gone there and then come back to the defendant. To make the information good the."

8. The last sentence in the first paragraph on page 8 may be changed to read as follows: "Now we will go down to (2); that will be section 333 (c) (2), that is, for having violated section 331 (a) or (d) if he establishes this guarantee."

9. In line 25 on page 8 the word "Sections" may be changed to the word "shipments."

10. The first paragraph on page 9 may be changed to read as follows: "So, one element of the offense is that this shipment was delivered by Richard Harrison Products into interstate commerce, introduced into it, or that Richard Harrison Products delivered it for introduction into interstate commerce."

69 11. In line 4 on page 13, after the word "charged" may be added the words: "then the indictment is bad."

12. In line 18 on page 13, after the word "state," and before the word "all" may be inserted the word "or."

13. In line 21 on page 13 the word "intrastate" may be changed to the word "interstate."

Dated: November 21, 1946.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,
JAMES M. CARTER,
United States Attorney,
ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Chief of Criminal Division.

By Arthur Livingston,
ARTHUR LIVINGSTON,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Appellant.

MILLER, HIGGS, FLETCHER & GLEN,
By Eugene W. Miller,
EUGENE W. MILLER,
Attorneys for Defendant and Appellee.

(Signed in duplicate.)

[Endorsement on cover:] File No. 51582. Southern California, D. C. U. S. Term No. 718. The United States of America, Appellant vs. Michael Walsh, an individual trading as Kelp Laboratories. Filed November 25, 1946. Term No. 718 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION.

In the District Court of the United States for the Northern District of California, Southern Division

Criminal No. 8987

UNITED STATES OF AMERICA

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on September 18, 1946, dismissing the information.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V,

682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 301 (21 U. S. C. 331). The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * * *
>
> (h) The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false,
>
> * * *
>
> SEC. 303 (21 U. S. C. 333). Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.
>
> * * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, * * *.

THE ISSUE AND THE RULING BELOW

The defendant was charged in an information in two counts filed in the District Court on April 25, 1946, with having given a false guaranty in violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act. The information alleged that the defendant, doing business in San Diego, California, as Kelp Laboratories, in December 1943 gave to Richard Harrison Products, of Hollywood, California, a continuing guaranty that no food, drug, device, or cosmetic thereafter shipped or delivered to Richard Harrison Products by the defendant would be adulterated or misbranded within the meaning of the Act; that in February 1945, while the guaranty was in full force and effect, the defendant consigned to Richard Harrison Products, at Hollywood, a number of packages of a vitamin product which was adulterated (count 1) and misbranded (count 2); and

that "prior and subsequent [to the date of this shipment], the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant."

The defendant moved to dismiss the information on the ground that it did not state an offense, because it showed on its face that the shipment on which the charges were based was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for someone outside of California or that it intended to sell the food as part of its interstate rather than its intrastate business. The district court granted the motion to dismiss, stating that it was a close question whether Congress intended the false guaranty provision to cover an intrastate shipment to a consignee who might introduce the goods into interstate commerce where actual interstate shipment is not established, and that, therefore, the criminal provisions of the Act could not be construed to apply to such an equivocal situation. The decision of the District Court, therefore, involved a construction of the Federal Food, Drug, and Cosmetic Act, and its ruling is subject to review by the Supreme Court on direct appeal. See, e. g., *United States* v. *Borden Co.*, 308 U. S. 188, 194–195.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court that the guaranty provision of Section 301 (h) of the Federal Food, Drug, and Cosmetic Act, and consequently the criminal provisions of Section 303 (a), do not apply to intrastate shipments to consignees doing business in interstate commerce unless reshipment in interstate commerce is established, is of manifest importance. Such a restrictive interpretation hampers effective administration of the Act and effectuation of its wholesome purposes to protect the public against dissemination of adulterated or misbranded food and drugs, for preventive or punitive action against persons shipping such commodities could not be taken until actual interstate shipment occurred, even though it appeared that such shipment was probable.

The guaranty provisions of the earlier Food and Drugs Act of 1906 (c. 3915, § 9, 34 Stat. 771, 21 U. S. C. 13 (1934 ed.)) were contained in a single section providing:

> SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to af-

> ford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Under that provision, therefore, the guarantor was substituted for the dealer who had received the guaranty, and was subject to such—but only such—liabilities as the dealer himself would have suffered if there had been no guaranty. Thus, under the 1906 Act, since the dealer was liable only on account of interstate shipments, the guarantor could only be prosecuted where an interstate shipment was involved (see 21 U. S. C. 2 (1934 ed.)).

In the Federal Food, Drug, and Cosmetic Act of 1938, which repealed the Act of 1906 (see § 902 (a), 52 Stat. 1059), the guaranty provisions were rewritten as indicated in the pertinent sections quoted above. In the new provisions, Congress abandoned the substitution theory of liability of the guarantor and, in lieu thereof, added a flat prohibition against giving a false guaranty. That provision (§ 301 (h)) is not limited in its application to guaranties given in connection with commodities transported or to be transported in interstate commerce. The type of guaranty, falsification of which is prohibited, is defined, by

cross-reference to Section 303 (c) (2) of the Act, as a guaranty "that such article is not adulterated or misbranded, within the meaning" of the Act. Had Congress intended to limit the application of Section 301 (h) to instances of actual interstate transportation, it would have followed the existing pattern found in the 1906 Act.

We think it is clear, therefore, that it is an offense under Section 301 (h) of the 1938 Act to give a false guaranty that articles are not adulterated or misbranded, without regard to whether they are transported or intended to be transported in interstate commerce. That the section, so construed, may apply in respect of articles not shown to have been shipped interstate does not pose any constitutional issue, since it is well established that Congress may legislate with respect to intrastate activities which so affect interstate commerce as to make their regulation an appropriate means to the attainment of a legitimate end, the exercise of the power vested in Congress to regulate interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 115; *United States* v. *Darby*, 312 U. S. 100, 117–118; *Currin* v. *Wallace*, 306 U. S. 1, 11; *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 220–224. The necessity for regulating even purely intrastate activities for the effectuation of the federal purpose and power is apparent

here. Food and drug distributors who, as here, conduct both an interstate and intrastate business, are likely to reship in interstate commerce items which are shipped to them solely in intrastate commerce, and the fact that the goods are guaranteed might be an inducement to the distributor to introduce the product in interstate commerce without investigating as to whether they are violative of the Act. Since, in such circumstances, the distributor would be exempt from the penalties of the Act by virtue of Section 303 (c) (2), it was appropriate for Congress, in the effectuation of the purposes of the Act and to protect the integrity of guaranties it recognized, to punish the giving of a false guaranty in its inception, irrespective of whether the particular articles are ultmately shipped in interstate commerce. In this respect Section 301 (h) is like other prohibitions and controls of the Act which apply without regard to whether interstate transportation is involved. For example, Section 301 (i) (21 U. S. C. 331 (i)) prohibits the forging, counterfeiting, etc., of marks, stamps, etc., required by regulations under the Act. And Section 301 (e) (21 U. S. C. 331 (e)) prohibits the use of any representation that an application with respect to a new drug has become effective under the Act.

As we have shown, Section 301 (h) categorically prohibits the giving of a false guaranty.

Its application is not limited by its reference to Section 303 (c) (2) for a definition of the "guaranty," falsification of which is punishable, nor, as the defendant contends, by the reference in the latter section to Section 301 (a), which prohibits the introduction of adulterated or misbranded articles into interstate commerce. Section 303 (c) is, and on its face merely purports to be, an exemption from liability for the dealer who has been given a guaranty, and it is patent, therefore, that the only purpose of the reference to Section 301 (a) is to indicate the scope and application of the dealer's exemption; the reference obviously was not designed to amplify the definition of "guaranty" which follows and to which reference is made in Section 301 (h).

In view of the broad, practical, and salutary construction which the Court in *United States* v. *Dotterweich*, 320 U. S. 277,[1] stated must be given the Act, and in view of the unambiguous and unequivocal prohibition against the giving of false guarantees, we submit that the decision of the District Court is erroneous and in derogation of national policy. And the rule that criminal statutes must be strictly construed, upon which the District Court relied, does not require that the beneficent purposes of the Act should be frus-

[1] Cf. also *Arner* v. *United States*, 142 F. 2d 730, 736 (C. C. A. 1), certiorari denied, 323 U. S. 730; *United States* v. *Lee*, 131 F. 2d 464, 466 (C. C. A. 7).

trated by an artificial interpretation of language which, on its face, and in keeping with those purposes, clearly proscribes the acts charged in the information. See *United States* v. *Dotterweich*, 320 U. S. at 283; *United States* v. *Research Laboratories*, 126 F. 2d 42, 45 (C. C. A. 9), certiorari denied, 317 U. S. 656.

Appended hereto is a copy of the oral opinion rendered by the District Court on July 11, 1946.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JAMES M. CARTER,
United States Attorney for the Southern District of California.

In the United States District Court for the Southern District of California, Southern Division

Honorable J. F. T. O'Connor, Judge Presiding

No. 8987 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California, Thursday, July 11, 1946

* * * * * *

The COURT. It is a very close question here raised. Unless the act can be justified under the interstate commerce laws of the Constitution, of course it is unconstitutional. Probably the most discussed and analyzed constitutional provision is the one on interstate commerce. My recollection of the first case was *Gibbs* v. *Hogan*. Since the enactment of the Fair Labor Standards Act there has been a renewed discussion and a great number of decisions construing the interstate commerce application to various facts. This court is bound by the decisions of the Supreme Court of the United States in all of those matters.

Under the Fair Labor Standards Act there seems to be no limit to the extension of that particular act of Congress on the questions raised as to how it is extended. One of the very late decisions is *Borden Company* v. *Borella,* 325 U. S. 679. In that case the Borden Company had its principal offices in New York. It owned and operated an office building in which 58 per cent of the rental space was used for its central office for production of goods for interstate commerce, although the goods were actually produced at plants located elsewhere. Now, there were no goods at all manufactured or placed in interstate commerce in the state of New York.

The Supreme Court, with the vigorous dissent by the Chief Justice of the United States, held that it was not necessary to produce any goods for interstate commerce if the company managed its business from the state employees in that office and in that building—they were held engaged in the production of goods for interstate commerce although no goods were produced for interstate commerce in that state. Chief Justice Stone said in part in his dissent:

> The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that

process, but it does not also include those are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Company* v. *Walling, supra.*

The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. *McLeod* v. *Threlkeld,* 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it. I would reverse the judgment. Mr. Justice Roberts joins in this opinion.

There is another opinion, and I do not have the citation at hand, but it was rendered about the same time, in which the Supreme Court held that certain goods were produced in the city of New York and sold to a company and the second company placed the goods in interstate commerce. The manufacturing company put no goods in interstate commerce, merely sold them to another company which in turn did place them in interstate commerce.

The Supreme Court for the United States in another case held that a janitor of a building who was not employed by and had no connection with the company that had rented space in the building and was engaged in interstate commerce, that the janitor was engaged in production of goods for interstate commerce and came under the Fair Labor Standards Act.

In *Warren-Bradshaw Drilling Company* v. *Hall,* 317 U. S. 88, an independent contractor who drilled holes in the ground to produce oil and had no other connection with the oil company or the production of oil for interstate commerce and did not produce oil for interstate commerce except that it drilled the holes and was paid for that particular operation, it was held that the employees of the independent drilling company were producing goods for interstate commerce and came under the provisions of the Fair Labor Standards Act.

In *Jewell Ridge Coal Company* v. *Local 6167* in 325 U. S. 161, the Supreme Court went so far as to hold null and void a collective bargaining agreement, against because of the Fair Labor Standards Act. There was dissent from the majority opinion by the Chief Justice, Mr. Justice Roberts, and Mr. Justice Frankfurter.

Again the Supreme Court of the United States in *10 East 40th Street Building, Inc.,* v. *Callus, et al.,* in 325 U. S. 578, held:

Maintenance employees of a typical metropolitan office building, operated as an independent enterprise, which is used and to be used for offices by every variety of tenants, including some producers of goods for commerce, held not to have such a close and immediate tie with the process of production as to be deemed engaged in an occupation necessary to the production of goods for commerce, within the meaning of Section 3 (j) of the Fair Labor Standards Act, and therefore not covered by the act.

Mr. Justice Frankfurter wrote the opinion. The Chief Justice Stone referred to his opinion in the *Borden* v. *Borella* case and stated that his views there would control his decision in this case. Mr. Justice Murphy dissented.

These few cases are mentioned to indicate the flux of the law and somewhat the uncertainty as to just what extent the Supreme Court of the United States, which controls all of the decisions of this court, have found in these particular cases.

Now, will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they have the Fair Labor Standards Act?

There are those who contend there is nothing left for the states in the way of intrastate commerce. A farmer who brings his potatoes to sell in the city could probably be charged with the

knowledge that some of those potatoes are going into interstate commerce. The same is true of eggs or any other products that are farmed.

The information in the case before the court alleges that Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food labeled as aforesaid which had been supplied by the said defendant. Therefore, the sole issue under this motion before the court is whether or not packages delivered under the act to Richard Harrison Products by the defendant Michael Walsh, an individual trading as Kelp Laboratories, which might never go into interstate commerce—the mere fact that they might place these particular packages in interstate commerce is sufficient according to the contention of the government.

It is the government's position that it is not necessary to follow the particular shipment here by the defendant into the channels of interstate commerce, that they might rest in Hollywood, having been shipped from San Diego, and be sold locally to a drug store or some other purchaser in Hollywood; that is a violation of the statute because some other packages were shipped in interstate commerce. The information alleges that similar packages had been shipped and labeled similar to the particular one before the court by the Richard Harrison Products.

I believe you will all agree that it is a very close question. There is no decision exactly in point. There is a distinction between the interpretation of the Fair Labor Standards Act and this particular Pure Food and Drug Act in that the court is now confronted with the statute, Section 333, Title 21 U. S. C. A., which provides:

> Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

We all know that criminal statutes must be strictly construed and shall not be extended by the courts so as to brand individuals as criminals unless there is clear authority under the law to do so.

The Government asks this court to assume that the particular shipment in question and described in the information will be placed in interstate commerce and thus bring the defendant within the terms of the act. I do not believe that it is the policy of Congress or of the courts to extend

criminal statutes or to anticipate acts which are not criminal at the time and which might never become criminal in order to find the defendant guilty. Such an interruption of business would do violence to all the civil rights of an individual.

Courts are instituted to not only enforce the law against those who violate it but to protect those who have not violated the law even charged with an offense.

The court has spent considerable time reviewing this particular law when the court tried the case of Barnes. That is found in 142 Fed. (2d) 648. Barnes was found guilty in my court and the decision was affirmed by the Ninth Circuit.

The motion to dismiss on all the grounds urged by the defendant will be granted and exception will be allowed to the Government.

U. S. GOVERNMENT PRINTING OFFICE 1946

FILE COPY

APR 9 1947

No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

No formal opinion was rendered by the district court. The oral opinion of the court sustaining appellee's motion to dismiss the criminal information appears at pp. 18-22 of the record.

JURISDICTION

The jurisdiction of this Court on direct appeal is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by section 238 of the Judicial Code, as amended, 28 U. S. C. 345. The order of the district court

dismissing the information against the appellee was entered September 18, 1946 (R. 22–23). The notice of appeal was filed October 17, 1946 (R. 23). This Court noted probable jurisdiction on December 16, 1946 (R. 25).

QUESTION PRESENTED

Section 301 (h) of the Federal Food, Drug, and Cosmetic Act prohibits the giving of a false guaranty to a receiver of any food, drug, device, or cosmetic to the effect that such article is not adulterated or misbranded within the meaning of the Act. The question is whether the giving of a guaranty which is false in respect of a shipment to a distributor in the same state is violative of section 301 (h), irrespective of whether the distributor in turn ships the article in interstate commerce.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 301 (21 U. S. C. 331). The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * * *
>
> (h) The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false,

except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303 (c) (3), which guaranty or undertaking is false.

SEC. 303 (21 U. S. C. 333). (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

* * * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act,

or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce; or (3) for having violated section 301 (a), where the violation exists because the article is adulterated by reason of containing a coal-tar color not from a batch certified in accordance with regulations promulgated by the Administrator under this act, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the coal-tar color, to the effect that such color was from a batch certified in accordance with the applicable regulations promulgated by the Administrator under this Act.

SEC. 402 (21 U. S. C. 342). A food shall be deemed to be adulterated—

* * * * *

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; * * *.

SEC. 403 (21 U. S. C. 343). A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

STATEMENT

The appellee was charged in an information in two counts filed in the district court on April 25, 1946, with having given a false guaranty in violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act (R. 1–5). The information

alleges in the first count that the appellee, doing business in San Diego, California, as Kelp Laboratories, in February 1943 gave to Richard Harrison Products, of Hollywood, California, a guaranty in the following terms (R. 1–2):

> The undersigned Kelp Laboratories, whose address is 3564 First Avenue, San Diego, Calif., hereby guarantees that no food, drug, device or cosmetic constituting, or being part of, any shipment or other delivery now or hereafter made to you by the undersigned will be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, or within the meaning of any applicable state or municipal law in which definitions of adulteration and misbranding are substantially the same as those contained in the Federal Food, Drug, and Cosmetic Act, or will be an article which may not, under the provisions of section 404 or 505 of said Act, be introduced into interstate commerce.
>
> This guaranty shall be a continuing guaranty and shall be binding upon the undersigned with respect to all foods, drugs, devices and cosmetics shipped or delivered to you by the undersigned (including goods in transit) before the receipt by you of written notice of the revocation thereof.[1]

[1] Continuing guaranties of this character are sanctioned by the following regulation promulgated under the Act (21 C. F. R. Cum. Supp., ch. 1, § 2.5):

"(a) A guaranty or undertaking referred to in section 303 (c) (2) of the Act may be:

The first count then alleges that on February 24, 1945, while the guaranty was in full force and effect, the appellee consigned to Richard Harrison Products, at Hollywood, a number of packages of a vitamin product, alleged to be a food within the meaning of section 201 (f) (1) of the Act (21 U. S. C. 321 (f) (1)), the labels of which represented that six tablets daily would furnish, *inter alia*, 10 milligrams of niacinamide, and would supplement the diet with one and one-half times the minimum adult daily requirement of vitamin B_1 and the full requirement of vitamin G (R. 2–3).[2] It is also alleged that "prior and subsequent [to the date of this shipment], the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant" (R. 3). The count charges that the shipment made on February 24, 1945, was adulterated within the meaning of section 402 (b) (1) (*supra*, p. 4) in that niacinamide, a valuable

"(2). General and continuing, in which case, in its application to any shipment or other delivery of an article, it shall be considered to have been given at the date such article was shipped or delivered by the person who gives the guaranty or undertaking."

Hence, the applicability of section 301 (h) to such an agreement is clear. See *Barnes* v. *United States*, 142 F. 2d 648, 650 (C. C. A. 9); *Glaser, Kohn & Co.* v. *United States*, 224 Fed. 84, 87 (C. C. A. 7).

[2] Section 201 (f) defines "food" as including "(1) articles used for food or drink for man or other animals."

constituent of the food, had been omitted in part since six tablets would not provide 10 milligrams of niacinamide as the labels represented, but only a smaller amount of that substance; and that, accordingly, the guaranty was false in respect of that shipment because of the adulteration (*ibid.*).

The second count is similar in pattern to the first and charges that the guaranty was also false for the reason that the food was misbranded within the meaning of section 403 (a) (*supra*, p. 4) in that the labels misrepresented the niacinamide content of the tablets (R. 3–4).

The appellee moved to dismiss the information on the ground that it does not state an offense, because the shipment on which the charges are based was to a consignee within California, the state of origin, and there is no allegation that the consignee purchased the order for someone outside of California or that it intended to sell the food in its interstate rather than its intrastate business. The motion alleged that the information is ineffective in this respect because "The act provides that the offense is a 'delivery for introduction into Interstate Commerce.'" (R. 5–6). Elaborating on this contention on argument of the motion, counsel for the appellee relied upon the reference in section 301 (h) to the guaranty defined in section 303 (c) (2), which, in turn, refers to section 301 (a). He argued that since section 303 (c) (2) relieves the holder of a

guaranty from the penalties of section 303 (a) for having violated section 301 (a) by introducing a misbranded or adulterated article into interstate commerce, the prohibition of section 301 (h) against giving a false guaranty is likewise limited in its application in accordance with the provisions of section 301 (a), i. e., that section 301 (h) applies only to a guaranty which is false in respect of an interstate shipment, or, as counsel put it, "that guarantee is made in reference to the misdemeanor or crime that would be committed under 331 (a) [sec. 301 (a)]"; "the guarantee was never intended to cover anything that is intrastate" (R. 10); "The falsity described in Section 331 (h) [sec. 301 (h)] must be defined in terms of the conduct prohibited by Section 331 (a) [sec. 301 (a)]" (R. 11). Counsel also asserted that section 301 (h) could not constitutionally be applied in respect of an intrastate shipment (R. 9, 10–11), but later, in his rebuttal, he indicated that he was resting on his construction of the statute (R. 18).

In an oral opinion sustaining the motion to dismiss the information (R. 18–22), the district judge indicated that he had some doubt as to the constitutionality of section 301 (h) as it is sought to be applied here, for he stated at the outset that "Unless the act can be justified under the interstate commerce laws (*sic*) of the Constitution, of course it is unconstitutional" (R. 18). After referring to several recent decisions of this Court

dealing with the scope of the application of the Fair Labor Standards Act to various types of employees, the judge asked the rhetorical question, "will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they have the Fair Labor Standards Act?" (R. 20.) Stating that the issue of the application of section 301 (h) in respect of an intrastate shipment "is a very close question" (R. 21), the court adverted to the rule of strict construction of criminal statutes and said that it could not be presumed that the shipment in question had been or would be placed in interstate commerce "and thus bring the defendant within the terms of the act" (*ibid.*). The court concluded that the information should be dismissed "on all the grounds urged by the defendant" (R. 22). In final analysis, therefore, the court's decision rests—primarily, at least—on the view that, as a matter of construction, section 301 (h) "applies only to a guaranty which is false in relation to a shipment introduced or delivered for introduction into interstate commerce."

SPECIFICATION OF ERRORS TO BE URGED.

The district court erred:

1. In holding that the information did not state an offense under section 301 (h) of the Federal Food, Drug, and Cosmetic Act.

2. In holding that section 301 (h) of the Federal Food, Drug, and Cosmetic Act does not

apply to the giving of a false guaranty in respect of a shipment in intrastate commerce unless the consignee introduces the shipment into interstate commerce.

3. In holding that the appellee's giving of a false guaranty, as charged in the information, did not constitute a criminal violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act, because he was not charged with having given a false guaranty in respect of a shipment introduced into interstate commerce.

4. In granting the motion to dismiss the information.

SUMMARY OF ARGUMENT

I. No constitutional problem is involved in construing section 301 (h) of the Federal Food, Drug, and Cosmetic Act as positively prohibiting the giving of any false statutory guaranty, irrespective of whether the article to which it relates is ultimately introduced into interstate commerce. By giving a guaranty, the guarantor assures the distributor that the warranted goods may be shipped in interstate commerce without further inspection by him. Hence, the very act of giving a false guaranty has a direct effect upon interstate commerce and the federal purpose to keep the prohibited articles out of the channels of such commerce. Section 301 (h), so construed, is constitutionally valid whether it be viewed as an incident to the regulation of interstate com-

merce embodied in the Act, or as an effective means of enforcement, or as a protection of the integrity of documents created for purposes of interstate commerce.

II. Section 301 (h) positively prohibits the giving of any false guaranty that an article is not adulterated or misbranded within the meaning of the Act. The cross reference in that section to section 303 (c) (2) for a definition of the type of guaranty to which it applies, and the further reference in section 303 (c) (2) to section 301 (a) in defining the exemption from criminal penalties granted to a holder of a guaranty who has made an interstate shipment violative of section 301 (a), do not warrant engrafting upon the application of section 301 (h) the limitations of section 301 (a).

Under the earlier Food and Drugs Act of 1906, the liability of a dealer for having made an interstate shipment in violation of that act was transferred to the guarantor; the giving of a false guaranty was not, as such, prohibited. The present law rejects the substitution theory of liability of the guarantor; instead, section 301 (h) flatly prohibits the giving of a false statutory guaranty. This history demonstrates that the section was intended to apply to any false guaranty, without regard to whether the falsity is related to an interstate shipment.

III. Our construction of section 301 (h) promotes the great purposes of the Act to protect the

consuming public against adulterated and misbranded foods and drugs. For as we construe it, the section strikes at the roots of the evil at which the Act is directed by prohibiting and punishing at the source the harmful effects of falsely warranting that an article is not adulterated or misbranded and thus may be distributed in interstate commerce without further inspection.

The rule that criminal statutes must be strictly construed does not require that section 301 (h) be given a narrow construction wholly inconsistent with its evident meaning and the broad purposes of the Act.

ARGUMENT

The only question raised by the motion to dismiss and the ruling below is whether section 301 (h) of the Federal Food, Drug, and Cosmetics Act, prohibiting the giving of a false guaranty that any food, drug, device, or cosmetic is not adulterated or misbranded within the meaning of the Act, is applicable to such a guaranty which is false in respect of a shipment by the guarantor to the holder of the guaranty in the same state. In the instant case, although the information alleges that the holder had, both before and after the date of the shipment involved here, distributed quantities of the appellee's product in interstate commerce, there is no allegation that this particular shipment, or any part of it, was so distributed, and it was on this basis that the

appellee challenged the validity of the information to charge an offense under section 301 (h). While the court below expressed some doubt that section 301 (h) may constitutionally be applied in such a situation, its holding was, in effect, that by the terms of the Act itself, where the initial shipment is intrastate, this provision is not applicable unless and until the holder of the guaranty introduces the article to which the falsity relates into interstate commerce. The Government's position is that section 301 (h) applies *ipso facto* to the giving of any statutory guaranty which is false, irrespective of whether the holder of the guaranty ultimately distributes the adulterated or misbranded article in interstate or intrastate commerce; and that the district court's doubts as to the constitutionality of the section as applied to intrastate distribution are not well founded.

I

THE POSITIVE PROHIBITION OF SECTION 301 (h) AGAINST GIVING ANY STATUTORY GUARANTY WHICH IS FALSE IS CONSTITUTIONAL AS APPLIED TO AN INTRASTATE SHIPMENT

At the outset, we think it is clear that no constitutional problem is involved in the construction of section 301 (h) for which we contend. It hardly needs reiteration now that Congress may legislate in respect of "those activities intrastate which so affect interstate commerce, or the exercise of the power of Congress over it, as to make regulation of them appropriate means to the

attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119; see also *Wickard* v. *Filburn*, 317 U. S. 111, 124; *United States* v. *Darby*, 312 U. S. 100, 118–122; *Currin* v. *Wallace*, 306 U. S. 1.

When a manufacturer or processor expressly guarantees that a product is not adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, he obviously contemplates that such goods may move within the sphere covered by the federal act. And, since, by his guaranty, he assures his dealer that the goods may be so shipped in interstate commerce without further inspection by the dealer, the mere giving of the guaranty has a direct effect on the federal purpose to keep impure foods and drugs out of the channels of interstate commerce.

The absolute prohibition of a false guaranty, whether or not the illicit article ultimately moves in interstate commerce, falls within a number of patterns in which the regulation of intrastate activities has been upheld because of the relation of such activities to interstate commerce. It may be sustained on the ground that Congress having adopted the policy of excluding adulterated and misbranded articles from interstate commerce, it may choose "means reasonably adapted to the attainment of the permitted end, even though they in-

valve control of intrastate activities," *United States* v. *Darby*, *supra*, at 121; or on the ground that in sales by a manufacturer or processor to a distributor, interstate and intrastate commerce are so commingled that regulation of the intrastate transactions is incidental to and inseparable from regulation of the interstate activity. *United States* v. *New York Central Railroad*, 272 U. S. 457, 464. See also *Baltimore and Ohio Railroad* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 27. It can be supported on the theory that a flat prohibition is necessary because it is not known at the outset whether the goods will or will not move in interstate commerce. See *Mulford* v. *Smith*, 307 U. S. 38, 47, where tobacco marketing regulations affecting goods intended for intrastate shipment were sustained on the theory that since it was not known whether the products were destined for intrastate or interstate commerce, effective regulation required uniform application to all sales. It comes within the holding of this Court in *Thornton* v. *United States*, 271 U. S. 414, where inspection and preventive treatment of all cattle in a diseased area were required in order to prevent shipment of some of the cattle in interstate commerce without such treatment. It also falls within the theory of *Westfall* v. *United States*, 274 U. S. 256, 259, where this Court upheld the power of Congress to punish misapplication

of funds of a state bank belonging to the Federal Reserve System, even though there might be no loss to the reserve banks, on the theory that "when it is necessary, in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." See also *United States* v. *Darby, supra,* at 121, and cases cited. A close analogy is presented by *United States* v. *Ferger,* 250 U. S. 199, in which this Court upheld the power of Congress to punish forgery and uttering of fictitious bills of lading purporting to represent goods which do not exist and therefore would not be shipped in interstate commerce. This Court there said (p. 205):

> Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local; since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate.

In short, whether the positive prohibition against a false guaranty, even as to goods which may not be introduced into interstate commerce,

be justified as incidental to the regulation of interstate shipments, or as an effective means of enforcement, or as a protection of the integrity of documents created for purposes of interstate commerce, it is clearly an appropriate means of effectuating the purposes of the Federal Food, Drug, and Cosmetic Act, and hence a constitutional exercise of Congressional power.

II

THE LANGUAGE AND HISTORY OF SECTION 301 (h) SHOW THAT IT IS UNRESTRICTED IN ITS APPLICATION TO FALSE STATUTORY GUARANTIES

(a) *The terms of the statute.*—Section 301 (h) positively prohibits the "giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false"; by its own terms it excepts only a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article. With this single exception, the section plainly makes it unlawful to give any false statutory guaranty; there is nothing in the language of the section itself limiting its application only to guaranties related to articles introduced or delivered for introduction into interstate commerce.

The appellee, however, would import such a limitation into the section; he contends that since section 301 (a) prohibits only the interstate shipment of adulterated or misbranded articles, sec-

tion 301 (h) should be similarly limited. His argument is pitched upon the words "referred to in section 303 (c) (2)" appearing in section 301 (h) and the further reference in section 303 (c) (2) to section 301 (a).

We think it clear that these cross references furnish no support for the appellee's construction of section 301 (h). That section does not itself define the type of guaranty or undertaking, the falsification of which is prohibited, but simply refers to section 303 (c) (2) for such definition. In drafting the legislation it was, of course, necessary to mention the guaranty in both sections in order to accomplish the dual purpose to relieve the holder of a guaranty from the criminal penalties provided by section 303 (a) for shipping illicit articles in interstate commerce (see. 303 (c) (2)), and to protect the integrity of such

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In this connection, it is important to note that the prohibitions of section 301 and the penalties provided by section 303 (a) for violations of section 301 are absolute; consciousness of illegality is not an element of the prohibited acts. See *United States* v. *Dotterweich*, 320 U. S. 277, 280-281. The statute recognizes, however, that many interstate shippers are merely distributors who are not in a position to maintain controls adequate to assure that the products they handle are not adulterated or misbranded. Accordingly, to protect such distributors against application of the criminal penalties, Congress provided them with a valid defense in the event of prosecution by specifying in section 303 (c) that the penalties shall not apply to a person who establishes an appropriate guaranty—in the situation presented by this case, a guaranty by the person from whom he received the

guaranties by making the act of giving of a false guaranty itself an offense (sec. 301 (h)). Congress could, of course, have set forth the definition of the guaranty in both sections, but apparently because of its greater aptness in section 303 (c) (2) in expressing the purpose of that section, Congress chose to describe it in detail there and, in the interest of brevity and economy of language, to use the cross reference device in section 301 (h).[1] And the language it used in section 301 (h) for that purpose is obviously language of reference, not of limitation.

Nor is there anything in section 303 (c) (2) which supports the appellee's contention. The pertinent language of that section is: "no person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d)[2] if he establishes a guaranty

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article that it is not misbranded or adulterated within the meaning of the Act."

[1] In this connection, see S. Rep. No. 152, 75th Cong., 1st sess., p. 2: "The bill has been made shorter and less verbose than previous bills. That has been done without deleting any effective provisions." See also *United States* v. *Petrillo*, 332 U. S. 277, 282.

[2] Subsection (d) prohibits the introduction or delivery for introduction into interstate commerce of (1) a class of food which may, by reason of contamination with microorganisms during manufacture or processing in any locality, be injurious to health, unless the manufacturer or processor holds a permit from the Administrator prescribing conditions under which the food may be manufactured or processed (see sec. 404); and (2) any new drug unless an effec-

or undertaking *signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect,* in case of an alleged violation of section 301 (a), *that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act."*[8] It is evident that, for the purposes of the problem here, the italicized language constitutes the only part of this provision which is definitive of the words "guaranty" and "undertaking" appearing in section 301 (h) and, therefore, only this part is incorporated by reference in that section. Since section 303 (c) defines different types of guaranties which will save holders harmless from the penalties provided for violations of sections 301 (a) and 301 (d) (see footnotes 5 and 6, *supra*, ~~pp. 18-19~~), it was necessary to refer to those sections in defining the guaranties. But these references are merely descriptive of the situations in which

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tive application with respect to such drug has been filed with the Administrator (see sec. 505). Section 303 (c) (2) also provides for guaranties against both types of violations defined in section 301 (d).

[8] It should be noted that section 301 (a) also prohibits the interstate shipment of a food which bears or contains a ~~color~~ tar color other than one from a batch certified in accordance with regulations promulgated by the Administrator, for section 402 (c) declares that such use of any uncertified coal-tar colors shall constitute adulteration. Section 303 (c) (3) protects a shipper of any food which is so adulterated if he establishes a guaranty from the manufacturer of the color that it was from a certified batch.

a shipper of a prohibited article shall be protected against the imposition of criminal penalties if he holds an appropriate guaranty; they cannot properly be regarded as part of the definitions of guaranties contained in section 303 (c) and incorporated by reference in section 301 (h); and they furnish no warrant for reading into the otherwise unqualified prohibition of section 301 (h) the limitation upon the application of section 301 (a) to shipments introduced or delivered for introduction into interstate commerce.

(b) *The history of the guaranty provisions.*— A comparison of the guaranty provisions of the present law with their precursor in the Food and Drugs Act of 1906 likewise supports our construction of section 301 (h). Section 9 of the 1906 Act provided (34 Stat. 768, 771):

> That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford profection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

That provision merely substituted the guarantor for the dealer for the purposes of prosecution and the penalties provided by Section 2 of the 1906 Act for shipping adulterated or misbranded articles in interstate commerce. Hence, the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. See *Steinhardt Bros. & Co.* v. *United States*, 191 Fed. 798, 800 (C. C. A. 2); *United States* v. *Charles L. Heinle Specialty Co.*, 175 Fed. 299, 300-301 (E. D. Pa.). No liability attached for the act alone of giving a guaranty which was false.

As we have seen, Congress in the 1938 Act adopted a different approach to the problem of false guaranties. That statute was preceded by years of intensive study and debate in Congress on proposed changes in the existing food and drug law. The early bills introduced during this period contained guaranty provisions almost identical with the corresponding provisions of section 9 of the 1906 Act.[7] In the final stages of the legislative process, however, the present provisions were adopted.[8] While the legislative history of the 1938 Act does not otherwise contain any ex-

[7] See S. 1944, 73d Cong., 1st sess., sec. 17 (e); S. 2000, 73d Cong., 2d sess., sec. 17 (e); S. 2800, 73d Cong., 2d sess., sec. 17 (e); S. 5, 74th Cong., 1st sess., sec. 708 (e).

[8] These provisions first appeared in Committee Print No. 3, August 19, 1937, House Committee on Interstate and Foreign Commerce, of S. 5, 75th Cong., 1st sess., the bill which was finally enacted.

planation of the reasons for this change, it is apparent from the face of the statute that Congress deliberately abandoned the scheme of the earlier law whereby the guarantor was merely substituted for the dealer if and when the latter shipped an adulterated or misbranded article in interstate commerce. The guaranty device as a means of protecting interstate distributors against criminal liability was retained in section 303 (c), but in lieu of the substitution theory of the old law, Congress added section 301 (h) flatly prohibiting the giving of a guaranty which falsely warrants that an article is not adulterated or misbranded within the meaning of the Act. The only conditions of liability for a violation of this section are that the guaranty is false and that it be of the type defined by reference in section 303 (c), i. e., a guaranty which would protect the distributor against the criminal penalties of section 303 (a) in the event he ships an adulterated or misbranded article covered by the guaranty in interstate commerce and is thereafter charged with a violation of section 301 (a) or (d).

In the light of this history, it is clear, we think, that Congress did not intend in these provisions, as the appellee in effect insists, to accomplish by a different device merely the same result as was accomplished by the substitution theory of the 1906 Act in respect of interstate distribution. For, obviously, if Congress had intended that result, it would simply have reenacted the provisions

of the earlier statute. In view of the purpose of the law to prevent adulterated and misbranded articles from being introduced into the channels of intertsate commerce, the only logical inference to be drawn from the adoption of the entirely new basis of liability embodied in section 301 (h) is that Congress intended to impose absolute liability for giving a false guaranty, without regard to whether the guaranteed article is ultimately shipped in interstate or intrastate commerce. See Toulmin, *The Law of Foods, Drugs and Cosmetics* (1942), p. 62.[9]

Such a construction of section 301 (h) comports with and furthers the express congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to

[9] *Barnes* v. *United States*, 142 F. 2d 648 (C. C. A. 9), contains a dictum to the contrary. The Ninth Circuit there correctly said (p. 650) that liability under section 301 (a) for introducing an adulterated or misbranded article into interstate commerce may be avoided if the shipper holds a guaranty. But the court went on to say that in such circumstances "the liability is then imposed upon the guarantor" by virtue of section 301 (h), and that "under the statutory scheme the falsity described in the latter section must be defined in terms of the conduct prohibited by" section 301 (a). The fundamental error in the court's reasoning is its assumption that, as under the 1906 Act, the guarantor's liability is contingent upon whether the article is eventually distributed in interstate commerce. As we have shown, this construction is not permissible under the terms of section 301 (h) or its history. In any event, the question involved here was not present in the *Barnes* case, for the shipments were introduced directly into interstate commerce by the guarantor-defendants on behalf of their dealer.

"strengthen and extend that law's protection of the consumer" (S. Rep. No. 152, 75th Cong., 1st sess., p. 1; see also H. Rep. No. 2139, 75th Cong., 3d sess., p. 1). In *United States* v. *Dotterweich*, 320 U. S. 277, this Court recognized and enforced this purpose in holding that the responsible officers of a corporation as well as the corporation itself, are subject to liability for violations of section 301, even "though consciousness of wrongdoing be totally wanting" (p. 284). The Court stated (p. 282) that "Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it." This admonition is particularly appropriate here in view of the rejection in the present law of the scheme of the 1906 Act whereby the guarantor's liability on account of a false guaranty was contingent upon the act of another person and the adoption, instead, of a positive prohibition against giving a false statutory guaranty.

III

THE GOVERNMENT'S CONSTRUCTION OF SECTION 301 (h) PROMOTES THE BROAD PURPOSES OF THE ACT

We have shown (*supra*, pp. 13–16) that the construction of section 301 (h) for which we contend does not pose any question of constitutionality. Our discussion at this point relates to the practical aspects of the issue involved in this case.

The primary objective of the Act is to protect the consuming public against deleterious, adulterated, and misbranded foods, drugs, devices, and cosmetics. This Court has said that—

> The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. (*United States* v. *Dotterweich*, 320 U. S. 277, 280.)[10]

We think that the setting of section 301 (h) in the broad scheme of the Act and its relation to the Act's salutary purposes also support our view as to the proper construction. A manufacturer or processor who guarantees that his products are not adulterated or misbranded obviously intends to assure his dealers that, without fear of incurring the penalties of the Act, they may if they choose distribute those products in interstate commerce; and at the same time he obtains sales and promotional advantages accruing from his warrant of compliance with the Act. By the same token, the very existence of the guaranty has a tendency to encourage interstate distribution without the safeguard of an independent investi-

[10] See also *United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654, 667.

gation or analysis by the dealer to ascertain whether the articles are in fact adulterated or misbranded. Under the district court's construction of section 301 (h), following the pattern of the 1906 Act, the manufacturer or processor is not criminally liable on account of a false guaranty until the prohibited article is actually introduced into interstate commerce by the dealer and the purpose of the Act thereby frustrated. So construed, the threat of punishment is minimized, because it would depend upon the success of the Government in tracing an individual illegal shipment into interstate commerce. As we interpret section 301 (h), criminal responsibility attaches before the falsely guaranteed article is introduced into interstate commerce, for as so construed it prohibits *ipso facto* the giving of false guaranties. The result is that the detection and enforcement processes are greatly simplified, the certainty of punishment enhanced, and a greater deterrent provided against the giving of false guaranties. So construed, the section effectively strikes at the very roots of the evil at which the Act is directed by prohibiting and punishing at the source the harmful effects of falsely warranting that an article is not adulterated or misbranded and therefore may be distributed in interstate commerce.

Finally, the doctrine of strict construction of criminal statutes, upon which the district court

relied, does not require that its interpretation of section 301 (h) be adopted. To paraphrase the language of this Court in the *Dotterweich* case, 320 U. S. at 283, which is equally appropriate here, the history of section 301 (h), its relation to the broad purposes of the Act, its terms, and relevant practical considerations all refute the district court's construction, "once 'we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule.'" The rule of strict construction "does not require distortion or nullification of the evident meaning and purpose of the legislation." *United States* v. *Gaskin*, 320 U. S. 527, 529–530.

CONCLUSION.

For the foregoing reasons, the order of the district court should be reversed.

Respectfully submitted.

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APRIL 1947.

No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, Appellant

v.

MICHAEL WALSH, an Individual Trading as KELP LABORATORIES, Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF CASE

In April, 1946 the information in this matter was filed charging the appellee Michael Walsh, an individual trading as Kelp Laboratories, with giving a false guaranty under Sections 331 (h) of U.S.C., Title 21, the Federal Food, Drug and Cosmetic Act (Section 301 (h) of Act) (R. 1-5). The information contains two counts, the first charging the guaranty to be false because the food, consisting of vitamin capsules and tablets, was adulterated and the second charging a false guaranty because the food was misbranded (R. 1-5). The defect charged was that the

food contained less than 10 milligrams of niacinamide. The information states that the Kelp Laboratories on February 23, 1943, two years before the alleged offense, gave to Richard Harrison Products of Hollywood, California a continuing guaranty that the products thereafter shipped to Richard Harrison Products would not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act (R. 1-2). This guaranty is not stated to be attached to any shipment or that there is any statement or sign on any shipment that it is so guaranteed or that any shipment had any such guaranty or sign on it that would segregate it from the volume of intrastate shipments or business dong by the Kelp Laboratories or Richard Harrison Products. Each count stated that on or about February 24, 1945, while the guaranty was in force, the defendant delivered at San Diego, State of California, for shipment to Hollywood, State of California, consigned to Richard Harrison Products, the food in question (R. 2). Each count stated that on or about the date last mentioned and prior and subsequent thereto, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce similar food products supplied by defendant (R. 3). The information is silent as to the large amount of intrastate business that Richard Harrison Products did in California or as to the large intrastate business of the manufacturer, Kelp Laboratories. A California dealer in vitamin products manufactured there or a manufacturer in California would naturally do a great volume of business in California. Nothing in the information shows whether the commerce in the shipment in question had lost its character as purely

intrastate business of the manufacturer or of Richard Harrison Products and had moved into the situation where it could be held to be in the channels of interstate business. So far as the information states, the shipment was still moving wholly within the flow of intrastate commerce and was integrated into local business. There is no statement whatever in the information that this product ever moved in interstate commerce or was ever intended by either the dealer or the defendant to move into interstate commerce. So far as the allegations of the information allege, this shipment only went from San Diego to Hollywood in the State of California. On motion of defendant, the information was dismissed because it did not state an offense.

QUESTIONS PRESENTED

Defendant, in support of his motion to dismiss and the District Court's action thereon, asserts that:

1. Congress did not intend that Sec. 301 (b) should relate to products moving wholly intrastate;

2. If Congress had made a provision in the Act broad enough to make that an offense, then such provision would have been an unwarranted interference with intrastate business and unconstitutional; and

3. If either of the above points are affirmed, the information does not state an offense and was properly dismissed.

ARGUMENT

PART I.

CONGRESS DID NOT INTEND TO HAVE THE OFFENSE APPLY TO WHOLLY INTRASTATE TRANSACTIONS.

A. A REASONABLE INTERPRETATION OF THE ACT DERIVED FROM ITS LANGUAGE AND PURPOSE, AND THE RELATION OF ITS SECTIONS SHOWS THAT SECTION 301 (b) [21 U.S.C. 331 (b)] APPLIES ONLY TO SHIPMENTS THAT A DEALER ACTUALLY SENT INTERSTATE.

The Supreme Court of the United States has not construed the Act on the matters in question. We must, therefore, analyze with scrutiny those provisions of that Act itself which may relate to the offense and look not only to the words of the statute and to the relation between the sections of the Act, but also to its purpose.

We should at the outset of the discussion of this point refer to the heading of the final draft of the Act as passed by Congress. This final draft is headed as follows:

"PUBLIC, NO. 117, SEVENTY-FIFTH CONGRESS, CHAPTER 675, THIRD SESSION, S. 5

AN ACT

"To prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices and cosmetics and for other purposes."

The purpose expressed by Congress is not to prohibit the movement of misbranded drugs in intrastate commerce. It is "to prohibit *the movement in interstate commerce*."

The violations by defendant are charged under Sec. 301 (h) [21 U.S.C. 331 (h)] of the Act. The words of that section relating to the offense charged are:

> "The following acts and the causing thereof are hereby prohibited: * * *
>
> "(h) The giving of a guaranty or undertaking referred to in Section 303 (c) (2) [21 U.S.C. 333 (c) (2)], which guaranty or undertaking is false * * *."

This clause relates to the guaranty "referred to in Section 303 (c) (2)". We must first ascertain the purpose, scope and construction of such guaranty or undertaking so that we may know when and how it becomes false, and are therefore driven to examine Sec. 303 (c) (2) of the Act. The reading of that section must assist us in finding when the offense is committed.

Section 303 (c) (2) of the Act sets out the terms of such guaranty or undertaking and how the penalty can be avoided by a dealer *when he places in interstate commerce* an article that is adulterated or misbranded. The words of Sec. 303 (c) (2) referring to those terms material to the offense here charged are:

> "No person shall be subject to the penalties of subsection (a) of this section * * * (2) for having violated section 301 (a) * * * if he establishes a guaranty or undertaking signed by * * *, the person * * * from whom he received in good faith the article, to the effect, in case of an alleged violation of Section 301 (a), that such article is not adulterated or misbranded within the meaning of this Act, designating this Act * * *."

By the terms of Sec. 303 (c) (2) the guaranty or undertaking is given to prevent guilt and punishment for the violation of Section 301 (a). We must read

that section, therefore, and Sec. 303 (a) (2) in conjunction to find the purpose and scope of this guaranty. Its purpose is to prevent punishment for:

> "The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded * * *" Sec. 301 (a).

In the construction of Sec. 303 (c) (2) the important matters are: First, that the purpose is definitely to prevent the dealer, receiving the articles in good faith, from becoming subject to the penalties of Sec. 303 (a) of the Act *"in case of an alleged violation of Section 301 (a)"*, that is *"in case" the dealer moves the product in interstate commerce;* and Second, that the adulteration or misbranding guaranteed against is that "adulteration or misbranding within the meaning of the Act".

Certainty the guaranty protects the dealer in shipments moving in interstate commerce only. Definitely, the purpose is not to guarantee products going intrastate and not within the meaning of the Act but only those that go interstate and come within the meaning of Sec. 301 (a) and within the purpose of the Act, which is "to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices and cosmetics".

In *Barnes vs. United States*, 142 Fed. Rep., 2d Series, 648, l.c. 650, the Court, understanding this to be the proper construction, states at page 650 as follows:

> "Under the present act persons are subject to its penalties for introducing or delivering for introduction into interstate commerce any foor that is adulterated or misbranded (Sec. 331 (a); 21 U.S.C., Sec. 331 (a), 21 U.S.C.A., 331 (a)).

But liability may be avoided if such persons have obtained a guaranty of the person from whom they in good faith received the product. 21 U.S.C., Sec. 333 (c) (2); 21 U.S.C.A., Sec. 333 (c) (2). Under such circumstances the liability is then imposed upon the guarantor. This imposition of liability is obtained through 21 U.S.C., Sec. 331 (h); 21 U.S.C.A., Sec. 331 (h), which creates a penalty for the giving of a false guaranty. *Thus under the statutory scheme the falsity described in the latter section must be defined in terms of the conduct prohibited by Section 331 (a).*"

(Italics ours.)

The above language was used in discussing the first two counts. These charged an offense under Section 301 (h) of the Act in which the dealer introduced the shipments into interstate commerce. Two other counts charge offenses for other acts of the defendant under Section 301 (a). The above quotation was not used in the discussion of these two other counts.

We must conclude that the guaranty or undertaking can have no reference whatever to any article that was made, transported and used solely intrastate. If the guaranteed person, the dealer, never introduced or delivered for introduction the article into interstate commerce, he would not be subject to any penalties under Sec. 301 (a) and consequently the guaranty would have no application. The guaranteed person needs no protection of a guaranty in intrastate shipments. The Act and the guaranty were not intended to cover such activities or articles. Sections 301 (a) and (h) of the Act contain nothing that makes any act an offense that has to do solely with intrastate transportation or activities. For the purposes of the

Federal Food, Drug and Cosmetic Act, Sec. 201 (b) (21 U.S.C. 321) of the Act sets out the definition of "interstate commerce" as follows:

"(b) The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof ****."

Irrespective of decisions under other Acts, interstate commerce is no broader than that definition in matters arising under the Federal Food, Drug and Cosmetic Act.

The above discussion is no more than the fair reasoning out of the meaning of clause (h) in Section 301 of the Act. This clause (h) cannot be read in isolation. It expressly refers to clause 2 of subparagraph (c) of Section 303 of the Act for the meaning of the guaranty which is to become false. Neither can clause 2 of subparagraph (c) of Section 303 of the Act be read in isolation. It expressly refers to clause (a) of Section 301 for the purpose of the guaranty and its scope and limitations. The language of *U. S. vs. Dotterweich*, 320 U.S. 277, l.c. 280 is apt in this connection: "The guaranty clause cannot be read in isolation." Naturally, all three of these clauses of Section 301 and 303 of the Act must be read together in order to ascertain a definition of the offense set out in clause (h) of Section 301 of the Act and all of these clauses and sections must be analyzed with the overall purpose of the Act in view as expressed in the heading of the bill, which purpose is "to prohibit the movement in interstate commerce of adulterated and misbranded food. . . ."

It is the guaranteed person's "introduction or delivery for introduction into interstate commerce" that

the guaranty protects. That is the intent and scope of the guaranty.

It does not refer to the introduction or delivery for introduction into interstate commerce by the guarantor, which here is the manufacturer, defendant Walsh. Walsh is not charged with any unlawful introduction or delivery for introduction into interstate commerce. It is this dealer's introduction or delivery for introduction of an adulterated or misbranded article and the offense therefor that is to be protected by this guaranty. This dealer is not introducing the article into interstate commerce by allowing it to sit dormant in his warehouse. From that point he may sell it in Hollywood or San Francisco or he may return it to the guarantor. He may never violate Sec. 301 (a) of the Act. He may never do any act that the guaranty was given to protect and if he did not, the guaranty would never become false within the meaning of the Act. We must recall that this guaranty was given on Feb. 23, 1943, to cover future shipments. The construction asked for by the appellant would penalize the manufacturer even though the dealer had never at any time during the ensuing years shipped any of the product interstate. It would penalize the manufacturer for a misbranded shipment if he had an express agreement with the dealer that such shipment was to go intrastate only.

B. THE GUARANTY DOES NOT BECOME A FALSE GUARANTY OR BROKEN UNTIL THE PRODUCT MOVES IN INTERSTATE COMMERCE.

It seems conclusive from the above reasoning that this guaranty is not and cannot be broken and does not become a false guaranty within the meaning of the Act unless and until the guaranteed person intro-

duces the article or delivers it for introduction into interstate commerce. The Act does not cover intrastate activities. It is the act of the dealer in introducing the adulterated or misbranded article into interstate commerce that the guaranty is given to protect. We must place ourselves in the shoes of the party signing the guaranty. This party must interpret the guaranty he is signing by the construction of Section 303 (c) (2). He would read that section to determine what his guaranty means. When the guarantor signs that guaranty he must understand that it is made only to protect the acts of the person guaranteed in wrongfully placing the article in interstate commerce. The guarantor signing should and would not intend it to cover shipments that were to go wholly intrastate.

C. THE "ARTICLES" ARE "ADULTERATED OR MISBRANDED WITHIN THE MEANING" OF THE ACT ONLY WHEN SENT INTERSTATE AND THE GUARANTOR COULD NOT INTEND OTHERWISE ON MAKING THE GUARANTY UNDER SECTION 303 (c) (2).

In *Weeks vs. United States*, 245 U.S. 618 (l.c. 622) the Court stated:

> "The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded in either way."

When can "such article" (Sec. 303 (c) (2)) be considered to be "adulterated or misbranded within the meaning of the Act"? The words "such article" in this section "in case of an alleged violation" refer to the articles which the person guaranteed *had* actually introduced or delivered for introduction into interstate commerce *when* he "violated Section 301 (a)" of the

Act, that is, when an article *was* so delivered by that person guaranteed, into interstate commerce. Therefore, when the guarantor signs such guaranty he can only intend to cover "such article" that actually goes interstate within the meaning of Sec. 201 (b) of the Act and Sec. 301 (a) of the Act because the Act itself so intends. And when is "such article" adulterated or misbranded within the meaning of the Act? The Act defines "misbranding and adulteration" in Sec. 501 and 502 of the Act. But the Act in these sections means to cover only articles that go into or are delivered to go into interstate commerce. (Weeks vs. U. S. Supra). The Act so far as it relates to adulteration or misbranding cannot be construed to apply to articles that are made, used and transported wholly intrastate. The misbranding or adulteration of an article that is shipped from San Diego to Hollywood and used there, and that never goes beyond that point, is not an adulteration or misbranding of an article "within the meaning of this Act". The adulteration or misbranding of an article does not include adulteration or misbranding of an article that never goes outside of the state in which it is manufactured. We must again place ourselves in the shoes of the guarantor to see what he should understand in the construction of Section 303 (c) (2), to see what the guaranty he is signing means. When the guarantor signs such guaranty he must necessarily have that construction herein stated in mind and he would never intend to have the guaranty go beyond that scope, and to make this certain in the mind of the guarantor, Sec. 303 (c) (2) of the Act uses the words "designating this Act", so that this Act must be stated in the guaranty to keep the guaranty within the definite meaning of the Act.

D. THE FAILURE TO ENACT SECTION 9 OF 1906 IN ITS OWN EXACT LANGUAGE IS OF LITTLE ASSISTANCE IN THE INTERPRETATION OF SECTION 301 (h) OF THE PRESENT ACT.

It is stated that Sec. 9 of the Food and Drugs Act of 1906 (34 Stat. 771) provided for the guaranty, and the same section stated that the guaranteeing party shall be amenable to the prosecution and penalties "which would attach in due course to the dealer under the provisions of this Act", and it is further stated that the present Act contains no direct statement that the penalties to be meted out to the guarantor are the same as those which would have attached to the offense of the party guaranteed; and that, therefore, clause (h) of Section 301 of the present Act would not be limited by the offense stated in clause (a) of Sec. 301. This does not help us in the construction of Sec. 301 (h) of the new Act, relating to the offense and punishment of the guarantor, for the following reasons:

In the 1938 Act, Congress has rewritten the whole of the 1906 Act. It has simplified the Act and saved language and handled the subject by a more direct method. It has extended the scope of the Act to include additional products. It has, in fact, reorganized the whole Act.

The new Act starts out with definitions (Sec. 201) and a whole section is devoted to that. The next section (Sec. 301) describes the prohibited acts, and all of the prohibited acts of the law are stated under one section. It then devotes another section (Sec. 303) to all of the penalties for the offenses under the Act.

The old Act began with the creation of an offense for manufacturing within a territory or the District

of Columbia of products adulterated or misbranded (21 U.S.C. Sec. 1, 1926), and in that same section provided for the penalty. Likewise in the next section (21 U.S.C. Sec. 2, 1926) provision was made for the offense of introducing adulterated or misbranded products into interstate commerce and in the same section provision was made for the penalty for such offense. A further separate section (Sec. 9 of the Act) (21 U.S.C. Sec. 13, 1926) was devoted to the protection of a dealer by a guaranty. In that same section the penalty for the offense of the guarantor was provided for.

Congress intended evidently in the new Act to shorten the language of the statute by placing all of the descriptions of the offenses briefly in one section and all of the penalties briefly in another. 5 Rep. No. 152, 75th Congress, 1st sess., p. 2 states: "The bill has been made shorter and less verbose than previous bills. That has been done without deleting the effective provisions." Congress did not want to delete the effective provisions of former Sec. 9. It is obvious that Congress intended the reasonable construction of Sec. 301 (h) and Sec. 303 (c) (2) as stated previously in this brief, by reading them together. It was not necessary to be more definite. The argument that the deleting of the definite statements referred to in the old Sec. 9 is of little or no value whatever, in interpretation when we consider all of these circumstances.

In *U. S. vs. Dotterweich*, 320 U.S. 277, it was necessary for the Supreme Court to construe the 1938 Act. Section 4 of the Act of 1906 was not placed in the Act of 1938. Section 4 provided that the act of the agent of the corporation should be deemed the act of the corporation "as well as that of the person". It

was argued from this by the defendant that the deletion of this section from the new Act showed that Congress did not intend that the agent of the corporation should be liable. It was argued also that this position was strengthened because the provision as to guaranty would relieve a corporation from liability for an offense but would not relieve the agent of the corporation from such liability. The words of the Court in construing the Act may be of assistance in the construction requested in this case by the defendant, Walsh. At page 280 the Court stated:

> "The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938 Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience."

At page 281 the Court stated:

> "The history of federal food and drug legislation is a good illustration of the elaborate phrasing that was in earlier days deemed necessary to fasten criminal liability on corporations. Section 12 of the Food and Drugs Act of 1906 provided that [here Section 12 is quoted]. By 1938 legal understanding and practice had rendered such statement of the obvious superfluous. Deletion of words—in the interest of brevity and good draftsmanship—superfluous for holding a corporation criminally liable, can hardly be found ground for relieving from such liability the individual agents of the corporation."

This opinion shows that the deletion of the words "as well as that of the person", does not necessarily show that Congress did not intend that the agent of a

corporation could not be guilty of the offense. Likewise, in the case at bar, the fact that Congress did not see fit to repeat the exact language of Sec. 9 of the old Act is not of great importance in determining that Sec. 301 (h) should not be construed in connection with Sec. 303 (c) (2), and that Sec. 303 (c) (2) must not be read in isolation. Evidently Congress did not see the necessity of repeating these words of the old Section 9 and in the interest of brevity allowed the matter to be decided by the necessary construction of the sections read together, as shown above in this brief to be the reasonable construction.

I. IN SETTING OUT AN OFFENSE A PENAL STATUTE MUST BE PLAIN AND CERTAIN. A PERSON WITHIN ITS POSSIBLE RANGE SHOULD BE ABLE TO KNOW WITH REASONABLE CERTAINTY WHEN HE WOULD COMMIT AN OFFENSE. WE MUST NOT INTERPRET CONGRESS TO HAVE INTENDED A PARTY TO BE PUNISHED FOR A CRIME UNLESS THE STATUTE PLAINLY BRINGS HIS ACT WITHIN THE MEANING OF THE STATUTE.

Krichman vs. United States, 256 U.S. 363;
Pierce vs. United States, 314 U. S. 306;
United States vs. Larcher, 134 U.S. 624;
Champlin Refining Co. vs. Corporation Commission of Oklahoma, 286 U.S. 210;
Kraus & Bros. Inc. vs. United States, 327 U.S. 614 (1946).

In *Krichman vs. United States, supra*, the Court stated (l.c. 367-8):

"The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to

> Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government."

In *Pierce vs. United States, supra*, the Court stated (l.c. 311):

> "These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 US 451, 83 L ed 888, 59 S. Ct. 618, and cases cited. While the act should be interpreted 'so as . . . to give full effect to its plain terms,' Lamar v. United States, 241 US 103, 412, 60 L ed 912, 915, 36 S Ct 535; United States v. Barnow, 239 US 74, 60 L ed 155, 36 S Ct 19, we should not depart from its words and context."

In *Kraas & Bros., Inc. vs. United States, supra* the Court applied the general rule of construction of a criminal statute to a regulation made by the Administrator under power given by the Emergency Price Control Act of 1942. The Court stated that such regulation or a criminal statute must be explicit, unambiguous, and give adequate information as to the criminal conduct and that the criminal conduct must be set forth with clarity.

If Congress intended to make it an offense to misbrand an article that moved intirely intrastate or to falsely guarantee an article so moving, it should have made the Act so that plainly the construction of this appellee could not be reasonably placed on the Act. Congress did not clearly so state. If it is held that Con-

gress so intended, then to say the very least, it left the matter very much confused.

F. THE SCOPE OF A STATUTE DEFINING A CRIME CANNOT BE EXTENDED BEYOND THE MEANING OF ITS WORDS REASONABLY INTERPRETED IN ORDER TO BROADEN THE STATUTE TO COVER A GENERAL INTENT OF CONGRESS. "STATUTORY POLICY IS NOT A SUBSTITUTE FOR REASONABLE CERTAINTY."

United States v. Harris, 177 U.S. 305;
United States v. Wiltberger, 5 Whet. 76;
Sarlls v. United States, 152 U.S. 570;
Krichman v. United States, *supra*.

In *United States v. Harris*, *supra*, the Court stated (l.c. 308, 309):

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought."

The Court further stated (l.c. 309):

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a

penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning."

The Court then quoted from Chief Justice Marshall in *United States vs. Wiltberger, supra:*

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law, for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. . . . But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case

> which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

Congress has no way to express itself in making a law except by printed language, the usage of words. Of course, we should have in mind the general purpose of a statute, the purpose of the language and words, in order to construe their meaning when there is doubt, but we must not stultify words and language and the proper relation of one clause to another to effect a general purpose of the Act. We have above tried to ascertain the reasonable meaning of plain words used insofar as purpose of their usage can legitimately assist. Just because the general purpose of the statute is good and is to prevent adulteration and save the health of citizens or because the 1938 Act was designed to stiffen the penalty gives us no unlimited right to so amplify the meaning of these words and clauses as they actually and plainly express themselves in relation to each other, to enable prosecuting authorities to penalize every act that might be by them construed to injure the public health in the handling of foods and drugs, or that might be thought by them to be of assistance in enforcing the Act.

PART II:

EVEN HAD IT SO ATTEMPTED IN SECTION 301 (b) OF THE ACT, CONGRESS WOULD HAVE BEEN WITHOUT POWER TO ENACT

A LAW MAKING IT AN OFFENSE TO MISBRAND OR ADULTERATE PRODUCTS MOVING SOLELY IN INTRASTATE COMMERCE OR MAKE IT AN OFFENSE TO FALSELY GUARANTEE SUCH PRODUCTS SO MOVING.

Defendant asserted the unconstitutionality of such a provision in his argument in the District Court (R. 10 to 11 and 27, paragraph 9) and now so maintains. Defendant's attorney did not believe it necessary, in discussion before the District Court, to argue this point at length because he believed point (1) on page 3 was sufficient to cause the dismissal.

This is not necessary or appropriate to protect interstate commerce and is not a more convenient method of protection than exists without such law. The giving of a guaranty relating to branding of a product moving wholly intrastate does not have a direct or substantial effect on interstate commerce. It does not affect it in any "close and intimate fashion."

The interpretation maintained by the government would make it an offense for a manufacturer to give to a dealer a guaranty not in accord with the ingredients of the product even though the dealer traded wholly intrastate.

The question arises whether Congress would have this power.

In *United States vs. Wrightwood Dairy Company*, 315 U.S. 110 cited by appellant (appellant's brief, p. 14), the principle was laid down in general that if intrastate commerce directly and substantially interferes with interstate commerce regulations under a law, then that intrastate commerce could be regulated so

that it does not so interfere. The dairy products made and sold wholly intrastate in or about Chicago were selling at prices under the price regulation for dairy products going through interstate commerce. It was held (l.c. 125) in that case that the interstate commerce price could be regulated because it *directly* and *substantially interfered* with the price regulating of similar products going through interstate commerce. In fact, it destroyed the interstate commerce in dairy products in Chicago and its vicinity.

The Court stated (l.c. 120):

> "It is the effect upon interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power."

In *Consolidated Edison Company vs. National Labor Relations Board*, 305 U.S. 197, the question related to whether or not the intrastate activities of an electric company interfered with interstate commerce to the end that the National Labor Act could apply to intrastate commerce. The Court decided that the conducting of the intrastate commerce of the electric company could directly and seriously interfere with interstate commerce. It stated (l.c. 221):

> "Instantly the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone and radio would stop; lights maintained as aids to navigation would go out * * *."

This was quoted with approval from the opinion of the Circuit Court of Appeals to show how important a labor dispute in the intrastate commerce transactions could be in interference with interstate commerce.

The Court further stated (l.c. 222):

> "And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such close and intimate fashion as to be subject to federal control is left to be determined as individual cases arise. Id., see also Santa Cruz Packing Company vs. National Labor Relations Board, 303 U.S. 453, 466, 467."

Again the Court stated (l.c. 223):

> "The justification for the exercise of federal power should clearly appear (Florida vs. U. S., 282, U.S. 194, 211, 212), but the question in such a case would relate not to existence of the federal power but to the propriety of its exercise on a given state of facts."

In the case at bar that situation does not arise. It does not become necessary to penalize a citizen who misbranded an article shipped and used wholly intrastate in order to prevent misbranding of articles that go interstate, nor does it become necessary to penalize the giving of a false guaranty of products going wholly in intrastate business. There would be no sufficient reason for Congress to interfere with wholly intrastate transactions to prevent adulteration in interstate transactions. The enforcing officer could easily examine the adulterated articles in transit or in the state to which they are sent from the state of their origin to ascertain whether the law has been broken and interstate commerce interfered with under the Act. It is just as easy and as convenient and efficient to examine the adulterated article in Wichita, Kansas, after it has gone from Hollywood, California, into interstate commerce as it is to examine it in Hollywood, before it enters the channels of interstate commerce. An examination of the article at Hollywood is not more appropriate, ad

vantageous or adequate to prevent adulteration or misbranding than an examination of the article after it reaches another state.

We doubt the power of Congress to go beyond the scope of our reasonable construction of the Act in this respect for the purpose only of giving to the enforcing officer an alleged more "appropriate means" of enforcement. It is not a more appropriate means. It is a wholly unnecessary means and therefore an inappropriate means.

Here a guaranty is given on all future shipments. Under the interpretation asked for by the government, Section 301 (h) would penalize the giving of a guaranty that was not true relating to any intrastate shipment. It would penalize such act even though the dealer never at any time shipped any of the products interstate or never intended to ship interstate the product in question. It would penalize the manufacturer even though by express agreement between him and the dealer the particular product in question was to go wholly intrastate. That would be the effect of the construction of 301 (h) if we did not confine its meaning by reference to Section 303 (a) (2) and Section 301 (a) of the Act. And this is not necessary or appropriate.

Such interpretation of this provision would come within the meaning of the holdings in *Schechter Poultry Corp. vs. U. S.*, 295 U.S. 495. It would be regulating business wholly within a state that had never come and would never come within the flow of interstate commerce just as in that case the poultry had come to rest within the State of New York and the transactions concerning it thereafter were wholly intrastate business.

In that case (l.c. 546), the Court stated:

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

U. S. vs: Ferger, 250 U.S. 199, cited by appellant (page 16, appellant's brief) is not of great assistance here. The indictment charged that defendant counterfeited bills of lading to represent that goods were going in interstate commerce. These bills of lading were made complying with the Congressional Act relating to interstate and foreign commerce. The Court held that such bills of lading "for the movemnt of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with * * *." (l.c. 204). The Court stated that such bills of lading "are the efficient means of credit resorted to for the purpose of securing and fortifying the flow of a vast volume of interstate commerce * * *." Based upon these statements, the Court held that Congress had the power to punish the making of the fraudulent interstate bills of lading "as

a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills'.' In that case there is a direct and material interference with interstate commerce by an act intimately associated with it.

Currin v. Wallace, 306 U.S. 1, cited by appellant (page 14, appellant's brief), tested the Tobacco Inspection Act which required uniform standards of grading tobacco, etc. and under it markets were established for the sale of tobacco at auction. In the market in question in that case, 62% of the sales were made for the purpose of moving the product into interstate commerce and such percentage was so moved. The tobacco sold which was used intrastate could not be segregated in any practical way from that which moved interstate and the Court based the constitutionality of the Act on the finding as follows (l.c. 11):

> "Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale."

In the guaranty of foods and drugs going interstate, the intrastate business is not so commingled with the interstate business. It is not necessary or appropriate in the case at bar to so burden the intrastate business to protect the interstate business.

The statute and penalty could be effectively applied solely to the misbranded products going interstate and therefore to the guaranteeing of such products.

See Appendix for relative value of decisions under other congressional acts, such as National Labor Relations Act of 1935.

We therefore conclude that Congress has no power to make Section 301 (h), include products moving wholly intrastate. *The information does not state facts sufficient to show that such regulation by Congress is appropriate nor are there sufficient judicially noticed facts to so show.*

PART III.

THE INFORMATION IS THEREFORE INSUFFICIENT AND THE UNITED STATES DISTRICT COURT WAS JUSTIFIED IN DISMISSING IT.

If our interpretation of the Act is correct, then the information is insufficient and the United States District Court was right in dismissing it because some of the essential facts constituting the offense are not stated in plain and definite language: that is, the information contains no statement that Richard Harrison Products introduced the defective product or delivered it for introduction into interstate commerce.

Evans vs. United States, 153 U.S. 584
Pettibone vs. United States, 148 U.S. 197
Moens vs. United States, 267 Fed. 317
United States vs. Phelps Dodge Mercantile Co., 157 Fed. 2d No. 7, p. 453 of Fed. Rep. Advance Sheets

Rule 7 (c) of the Federal Rules of Criminal Procedure states:

> "Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The Court, in *Evans vs. United States*, 153 U.S. 584, l.c. 587 (38 L. Ed. 830), stated:

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged."

The Court, in *Pettibone vs. United States*, 148 U.S. 197 (37 L. Ed. 419) stated:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital."

The Court stated in *Moens vs. United States*, 267 Fed. 317 (l.c. 322):

"A clear rule as to the sufficiency of an indictment for a statutory offense is stated in Commonwealth vs. Young, 15 Grat. (Va.) 664, as follows: 'If the indictment may be true, and still the accused may not be guilty of that offense, the indictment is insufficient.'"

In the case at bar, to make the information good, it would be necessary to supply a statement to it by inference, intendment or implication.

In *United States vs. Phelps Dodge Mercantile Co.*, *supra*, the Court held that a statement that seizure was made while a shipment was still in the original packages after it had gone interstate, was no statement to the effect that the seizure was made while it was in interstate commerce.

The information states:

"That on or about February 24, 1945 and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food

labeled as aforesaid, which had been supplied by said defendant;"

These are the only statements in the information that relate to the shipments even possibly going into interstate commerce. From these statements we would be compelled to draw by inference that this shipment in question from defendant to Richard Harrison Products was actually introduced by Richard Harrison Products into interstate commerce or was actually delivered for introduction into interstate commerce. For all the information actually states, this shipment could have gone to Hollywood and stopped there or it could have been shipped from Hollywood to San Francisco and consumed there. We would be compelled, therefore, to assume that between various acts that could have occurred those were performed that introduced the product into interstate commerce and made the man guilty, instead of presuming that those acts were performed which would have made the shipment intrastate and have the man innocent of crime.

All of the statements of the indictment made plain and direct, could be true and yet the defendant be innocent, as stated in the *Moens* case above mentioned.

GENERAL DISCUSSION OF INFORMATION

Congress only intended, under a reasonable construction of the Act, not that the giving of the guaranty was an offense but that its *breach* was the offense when this breach occurred by the misbranded or adulterated articles going into interstate commerce. We maintain that our interpretation is not a restrictive one but a reasonable interpretation and that interpretation which a guarantor would reasonably make when he

signs the guaranty. The construction maintained by the appellant goes far beyond that which may be necessary to make the Act effective or give the enforcing authorities a fair opportunity of its enforcement.

This information does not state that defendant Walsh delivered the shipment to Richard Harrison Products, of Hollywood, for the purpose of its being sent into interstate commerce or that it ever went into interstate commerce and does not state that Richard Harrison Products ordered the shipment from defendant Walsh to send it into interstate commerce or that this shipment was ever intended to become or did become a part of the commerce between this state and "any place outside thereof." Under the construction of the Act which the appellant would have us make, the defendant would be guilty, and subject to the penalties of the Act even if the shipment went to Richard Harrison Products and stayed in Hollywood and never left there, or was shipped and consumed in the City of Sacramento or was returned to defendant; and defendant would, under such construction, be liable and suffer the heavy penalties of the Act even if there was an understanding or agreement between himself and Richard Harrison Products that the shipment was to take one or another of the above courses and never reach interstate commerce. The information is wholly silent relative to the purpose of the shipment and relative to whether or not that shipment was intended to or did reach the channels of interstate commerce. Such interpretation would not be a liberal interpretation allowed by decisions to effectuate the purposes of the Act. It would rather be a narrow and strict interpretation against manufac-

turers, a harsh interpretation enabling the prosecuting authorities to harass well-intending dealers and manufacturers of foods and drugs.

CONCLUSION

For the foregoing reasons, the order of the District Court should be sustained.

Dated April, 1947.

Respectfully submitted,

MILLER, HIGGS, FLETCHER and GLEEN

By Eugene W. Miller

Eugene W. Miller, Partner

APPENDIX

VALUE OF DECISIONS UNDER NATIONAL LABOR RELATIONS ACT OF 1935 AND FAIR LABOR STANDARDS ACT OF 1938 AND OTHER ACTS REGULATING INTERSTATE COMMERCE.

Decisions under the above acts are not necessarily controlling in the interpretation of the Food, Drug and Cosmetic Act of 1938 except in their relation to the power Congress may have under the Constitution to enact the laws in question. On the matter of whether or not a circumstance comes within the provisions of any of the above acts must evidently stand upon the separate construction of each of the acts.

The National Labor Relations Act asserts in Section 160 of Title 29, U.S.C.A., that the Board is empowered to prevent "any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce".

The term "affecting commerce" is defined in paragraph 7 of Section 152 of the Act to mean "in commerce or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce". Commerce is also defined in that Act in paragraph 6 of Section 152. Decisions, therefore, ascertaining what may come within the Act must interpret these paragraphs of Section 152 and cannot necessarily be used in the construction of another act which has no similar language. Many decisions interpret what acts affect commerce or burden or obstruct it or the free flow of commerce or tend to lead to a labor dispute burdening or obstructing commerce or its free flow.

The Fair Labor Standards Act of 1938 likewise defines its scope. Section 206 prevents the employer from employing for more than the designated number of hours per week "any of his employees who is engaged in commerce or in the production of goods for commerce".

Section 203 of that Act states that an employee is deemed "to have been engaged in production of goods" for commerce "if such employee was employed in producing * * * such goods or in any process or occupation necessary to the production thereof in any state." The decisions, therefore, necessarily interpret the meaning of those sections to define the scope of that Act and many decisions interpret when an employee is in an occupation or process necessary to production.

We are not concerned in decisions under these acts or under the Tobacco Inspection Act or the Agricultural Marketing Act except insofar as they may define the powers of Congress under the Constitution in relation to interstate commerce.

SUPREME COURT OF THE UNITED STATES

No. 718.—October Term, 1946.

The United States of America, Appellant, v. Michael Walsh, an Individual Trading as Kelp Laboratories.	On Appeal From the District Court of the United States for the Southern District of California.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

This appeal brings before us § 301 (h) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 1042, 21 U. S. C. § 331 (h), which prohibits the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act.

Appellee does business in San Diego, California, under the name of Kelp Laboratories. An information has been filed, charging appellee with having given a false guaranty, in violation of § 301 (h). The following facts have been alleged: In February, 1943, appellee gave a continuing guaranty to Richard Harrison Products, of Hollywood, California, stating that no products thereafter shipped to the latter would be adulterated or misbranded within the meaning of the Act. On February 24, 1945, while the guaranty was in full force and effect, appellee consigned to Richard Harrison Products, at Hollywood, a shipment of vitamin products which were allegedly adulterated and misbranded—thereby making the guaranty false in respect of that shipment. Prior and subsequent to the date of the shipment, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of the vitamin product supplied by appellee.

Appellee moved to dismiss the information on the ground that it did not state an offense. The argument was that § 301 (h) applies only to a guaranty that is false relative to an interstate shipment, whereas the alleged shipment here was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for someone outside California or that it intended to sell the products in its interstate rather than its intrastate business. The District Court gave an oral opinion sustaining appellee's contention and granting the motion to dismiss. The case is here on direct appeal by the United States.

The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. *United States* v. *Dotterweich*, 320 U. S. 277, 280. It is in that interstate setting that the various sections of the Act must be viewed.

But § 301 (h), with which we are concerned, does not speak specifically in interstate terms. It prohibits the "giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false," the only exception being as to a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article.[1] Nothing on the face of the section limits its application to guaranties relating

[1] Section 301 (h) prohibits "The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303 (c) (3), which guaranty or undertaking is false."

to articles introduced or delivered for introduction into interstate commerce. From all that appears, its proscription plainly extends to the giving of any false statutory guaranty, without regard to the interstate or intrastate character of the shipment in question, to those who are engaged in the business of making interstate shipments.

Nor do we find any interstate limitation of the type which appellee proposes in the reference made in § 301 (h) to § 303 (c) (2).[2] That reference is made simply to define the type of guaranty or undertaking the falsification of which is prohibited by § 301 (h). Instead of spelling out the matter, § 301 (h) adopts the reference in § 303 (c) (2) to "a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect . . . that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act." The fact that § 303 (c) (2) relieves a holder of such a guaranty from the criminal penalties provided by § 303 (a) for violating § 301 (a) does not carry over the interstate limitation of § 301 (a) to § 301 (h). Section 301 (a) prohibits the introduction or delivery for introduction into interstate commerce of illicit articles,[3] and § 303 (c) (2) relieves one from the

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[2] Section 303 (c) (2) provides that no person shall be subject to the penalties of § 303 (a) "for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce."

[3] Section 301 (a) prohibits "The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

liabilities of such introduction if one has a guaranty or undertaking as therein described. Section 301 (h) has adopted that description for the entirely different purpose of informing persons what kind of a guaranty or undertaking may not be given falsely. In other words, § 301 (a) is directed to illegal interstate shipments, while § 301 (h) is directed to the giving of false guaranties. Guaranties as described in § 303 (c) (2) may be used by interstate dealers in connection with either interstate or intrastate shipments and those guaranties that are false are outlawed by § 301 (h).

It is true, of course, that the guaranty referred to in § 303 (c) (2) is one given for the purpose of protecting the dealer "in case of an alleged violation of section 301 (a)," thereby relieving him of liability if he reships adulterated or misbranded goods in interstate commerce. But where such a guaranty, as in this case, is given to a dealer regularly engaged in making interstate shipments and who may therefore have need of the guaranty, § 301 (h) imposes liability on the guarantor if that guaranty turns out to be false. And that liability attaches even where the particular shipment which renders the guaranty false is not alleged to have been an interstate one.

It is significant that § 301 (h) had no counterpart in the predecessor statute, the Food and Drugs Act of 1906, 34 Stat. 768. Under § 9 of that Act, a dealer could not be prosecuted for shipping adulterated or misbranded articles in interstate commerce if he had a guaranty of a type similar to that referred to in the present statute. If there were such a guaranty, the guarantor was subject to the penalties which would otherwise attach to the dealer. The result was that the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. *Steinhardt Bros. & Co. v. United States*, 191 F. 798, 800; *United*

States v. *Charles L. Heinle Specialty Co.*, 175 F. 299, 300–301. There was no liability for issuing a false guaranty as such to one engaged in an interstate business. But in the 1938 Act, Congress added a new liability in the form of § 301 (h), making the guarantor liable for giving a false guaranty of the type referred to in § 303 (c) (2). We find it impossible to say that the framers of the 1938 Act added § 301 (h) for the useless purpose of achieving the same result as had been reached under the 1906 Act without such a provision.

We thus conclude that § 301 (h) definitely proscribes the giving of a false guaranty to one engaged wholly or partly in an interstate business irrespective of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. Such a construction is entirely consistent with the interstate setting of the Act. A manufacturer or processor ordinarily has no way of knowing whether a dealer, whose business includes making interstate sales, will redistribute a particular shipment in interstate or intrastate commerce. But if he guarantees that his product is not adulterated or misbranded within the meaning of the Act, he clearly intends to assure the dealer that the latter may redistribute the product in interstate commerce without incurring any of the liabilities of the Act. And the dealer is thereby more likely to engage in interstate distribution without making an independent check of the product. The possibility that a false guaranty may give rise to an illegal interstate shipment by such a dealer is strong enough to make reasonable the prohibition of all false guaranties to him, even though some of them may actually result only in intrastate distribution. By this means, some of the evils which Congress sought to eliminate are cut down at their source and the effectiveness of the Act's enforcement is greatly enhanced.

So construed, § 301 (h) raises no constitutional difficulties. The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case.

The judgment of the District Court is accordingly

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 718.—October Term, 1946.

The United States of America, Appellant, *v.* Michael Walsh, an Individual Trading as Kelp Laboratories.	On Appeal From the District Court of the United States for the Southern District of California.

[May 19, 1947.]

Mr. Justice Jackson, dissenting.

Stretch the Food and Drugs Act as we will, I cannot make it cover this charge as a crime. The statutory scheme is to make a crime of "The introduction or delivery for introduction into interstate commerce" of adulterated or misbranded goods. 52 Stat. 1042, 21 U. S. C. § 331 (a) and (d).

But since many shippers buy goods of others and do not know their precise ingredients, Congress allowed an escape for the violator, provided he acted in good faith and could trace the responsibility to another. This he must do by producing a signed guaranty or undertaking, and the statute requires that it shall be conditioned "to the effect, *in case of an alleged violation of* § 331 (a), that such article is not adulterated or misbranded . . . or to the effect, *in case of an alleged violation of* § 331 (d), that such article is not an article" forbidden shipment by stated paragraphs of the Act. (Emphasis added.) 52 Stat. 1043, 21 U. S. C. § 333 (c).

It will be noticed that Congress not only provided but repeated that the statutory bond required is "in case of an alleged violation" by introducing or delivering for introduction of goods in interstate commerce. No such violation has been alleged here; these goods were never

introduced or delivered for introduction into interstate commerce. But the Court seems to think it is enough that there are some grounds for expecting that this crime possibly, or probably, or perhaps pretty certainly, would eventually be committed.

Of course, if the assured had committed this offense and had fallen back on the guarantor, the statute which reached the assured would not be sufficient. To punish the responsible person, it was made a crime to give a false guaranty "referred to in" the statute. 52 Stat. 1042, 21 U. S. C. § 331 (h).

The Government now seeks to exact criminal responsibility on a guarantee, expressly conditioned only "in case of violation," in a case of no violation. Until a violation is alleged, the guaranty plays no statutory role at all. It might afford a cause of action if false, but that is quite different from making it a crime. For it is no guaranty at all for criminal prosecution purposes if violation of neither § 331 (a) nor § 331 (d) is alleged. The statute requires such violation to be alleged only, not proved, in order to put the guarantor rather than the assured to the proof. This is the only instance I recall where the guarantor is liable when there is no breach of the condition of the bond. The whole plan was to have a substituted liability in case the violator of the Act became such in good faith. This decision makes a new, independent and original liability where there has been no alleged violation by moving the goods in interstate commerce.

I do not think we should take such liberties in expanding criminal statutes in which the sovereign once was considered under a duty to be explicit and the subject entitled to the doubt.